85-1698

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AUDREY E. GUTHRIE,

Petitioner,

-against-

INTERNATIONAL DAIRY QUEEN, INC.,

ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the court of appeal's affirmance of the district court's summary dismissal of petitioner's antitrust complaint (a) without an evidentiary hearing; (b) without leave to amend the complaint; and (c) without receipt of 57 responses to petitioner's first set of written interrogatories does not violate the fundamental antitrust policy of the United States.

2. Whether plaintiff's antitrust complaint is not legally sufficient so as to prevent outright summary dismissal, again, in accord with fundamental antitrust policy.

3. Whether the court of appeal's refusal -twice, to review the legality of the district court's summary sanctioning of petitioner's counsel does not deprive both petitioner and counsel of due process of law.

PARTIES

1. Plaintiffs-appellants and Petitioner:

Paul M. Fennessy and Audrey E. Guthrie, individually and as executrix of the estate of Wallace D. Guthrie, deceased. Plaintiff Guthrie was the only appellant on the second appeal and is the sole petitioner here.

2. Defendants-appellees and Respondents:

A. Dairy Queen Group of Defendants:

Only the underscored defendants were appellees on the second appeal and respondents here: International Dairy Queen, Inc., and d/b/a IDQ Distributors, Dairy Queen Supply and FSI; American Dairy Queen Corporation; Dairy Queen Financial, Inc.; Dairy Queen Realty, Inc.; Brazier Foods, Inc.; Golden Skillet International, Inc.; "Dairy Queen" National Dealer Marketing Council; "Dairy Queen" Territory Operators Advisory Council; "Dairy Queen" Frozen Products (Canada) Limited; IDQ Distributors of Canada, Limited; "Dairy

Queen" Canadian Dealer Marketing Council; Texas Dairy Queen Operators Council; Dairy Queen Japan Co., Ltd.; Dairy Queen Japan National Dealer Marketing Council and the Queen's Jesters.

B. Dairy Queen Supplier Group of Defendants: American Can Company; Bagcraft Corp. of America; Beatrice Food Company; Beck Vanilla Products Company; Butcher Boy Food Products, Inc., Campbell-Mithun Incorporated; Carter Paper Company; Cash Plus, Inc.; The Coca-Cola Company; Commercial Testing Laboratory, Inc; Crowley Foods, Inc.; The Continental Group, Inc.; Continental Can Company, Inc.; Delicious Food Co.; SCM Corp.; Econovent Systems, Inc.; Dairy Queen of New Jersey, Inc.; FisherNut Company; George Fox Company; George & Thomas Cone Company; Granite State Packing Company; Green Bay Foods Company; H.C. Duke & Son, Inc.; Henry & Henry, Inc; Hickman, Coward & Wattles, Inc.; Hunt-Wesson Food, Inc.;

Iceland Seafood Corporation; Interbake Foods, Inc.; J. Hungerford Smith Company, Inc.; Keebler Company; Kraft, Inc.; Lever Brothers; Lind Plastic Products, Inc.; Liqui-Box Corporation; Maryland Cup Corporation; Eagle Cone Corp.; Eastern Baking Company, Inc.; Sweetheart Plastics, Inc.; Nieco Product, Inc.; Owens-Illinois, Inc.; Pepsico, Inc.; Premier Industries; Queens Farms Dairies, Inc.; Richardson Corporation; Shade Foods, Inc.; Schweigert Meat Company; Standard Foods, Inc.; Sysco Frosted Foods, Inc.; Stoelting Bros. Mfg. Co., Inc.; Stewart Sutherland, Inc.; Summit Travel Service; The Terson Company, Inc.; Ward-Johnston, Inc.; Union Carbide Corp.; United Brands Company; Upstate Milk Cooperative, Inc.; Victor Foods, Inc.; Valmac Industries, Inc.; Worcester Quality Foods, Inc.

C. Named defendants not served as of the date of dismissal or found insolvent or

against whom the action was discontinued as of March 12, 1984:

Allied Meat Co.; Cummings Incorporated; Dart Corp.; Garden State Farms, Inc.; Food ServiceProducts Company; G. D. Anderson Associates; Glazer, Crandall Company; Han-Dee Pak, Inc.; Hank Ketchum; Interstate Distributors, Inc.; Food Producers (Int'l), Inc.; Plastics, Inc.; Presto Food Producers, Inc.; Suzanna's Kitchen, Inc. and the Travelers Indemnity Company and General Mills, Inc.

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STATUTES

Sherman Act

> §1. Every contract, combination in the form of trust or otherwise ,or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every

person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof , shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

26 Stat. 209 (1890), as amended, 15 U.S.C.A. §§1-7 (1980).....passim.

Clayton Act

§3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies,or other commodities, whether patented or unpatented, for use, consumption or resale within the United States,

or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on condition, agreement, or understanding that the lesee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

38 Stat. 730 (1914), as amended, 15 U.S.C.A. §§ 12-27 (1980).....passim.

Donnelly Act

Contracts or agreements for monopoly or in restraint of trade illegal and void

1. Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state , is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct

of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AUDREY E. GUTHRIE,

Petitioner,

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Respondents.

PRAYER

Petitioner Audrey E. Guthrie and Thomas A. King, her attorney, respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on January 17, 1986.

OPINIONS BELOW

The opinions of the Court of Appeals appear in the Appendix hereto. The opinions of the District Court for the Northern District of

New York together with its order staying the sanction against counsel also appear in the Appendix.

JURISDICTION

The order of the Court of Appeals for the Second Circuit was entered on January 17, 1986. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a second appeal from the order of Chief Judge Howard G. Munson of the Northern District of New York summarily dismissing a private treble damage antitrust action brought by two Dairy Queen franchisees against the Dairy Queen fast food franchisor and a group of approved suppliers for violations of the Sherman and Clayton Acts. The appeal was dismisssed by the Second Circuit Court of Appeals after having been extensively briefed and fully argued in that

Court on October 15, 1984,because the district judge left a one million dollar counterclaim still pending. Certiorari was denied on February 19, 1985, sub. nom. Fennessy v. Dairy Queen, 105 S. Ct. 1193. Thereafter, on June 19, 1985, this counterclaim having been dropped by the counterclaiming defendant, the district court reaffirmed its prior orders. On petitioner's second appeal, these orders were affirmed, but not under Rule 11.

The complaint was filed on December 29, 1983 and as of March 12, 1984, the date of the complaint's dismissal "without prejudice" but without leave to re-plead, plaintiffs had served some 77 of the 90 named defendants and voluntarily dismissed as to one.* Plaintiffs served their first set of written

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* The complaint was dismissed as to all 77 defendants although only 9 defendants moved to dismiss.

interrogatories with the complaint on all defendants except the Dairy Queen group of defendants. 15 defendants had answered the complaint as of March 12, 1984. 9 defendants moved to dismiss the complaint on that date. 5 defendants had formally answered plaintiffs' interrogatories on March 12, 1984, while 2 others had provided informal responses. Pursuant to stipulation and order entered thereon by Judge Munson, answers from defendants SCM Corp., Geo. & Thos. Cone Co., H. C. Duke & Son, Inc., Schweigert Meat Co., Bagcraft Corp. of America, Carter Paper Co. and Plastics, Inc. were due on March 15, 1984. Answers from Beck Vanilla Products Co., Liqui-Box Corporation, Queens Farms Dairies, Hickman, Coward & Wattles, Interstate Distributors and Lind Plastic Products would all have been due between March 19 and March 23, 1984. The answers of Iceland Seafood, United Brands, Shade Foods and Geo. Fox Co. would all have been due from March 28

through April 9, 1984. In addition, again, as in most cases, stipulated and ordered by Judge Munson, some 57 answers to plaintiffs' first set of written interrogatories would have been duefrom the defendants between March 20 and April 1, 1984. Several defendants were in default of answering the interrogatories and had no stipulation extending their time to answer the same. In sum, a large and important number of interrogatory answers and pertinent evidence would have been in the Court's hands for evaluation within the next 15 days, all of which evidence was never received by reason of its ruling of March 12, 1984** The case is fundamentally a pleading case, or perhaps better stated in the converse, while incidentally a pleading case, raises fundamental policy questions under the United States antitrust laws.

**Plaintiffs granted liberal extensions of time to answer both the complaint and interrogatories to every requesting defendant.

The main allegations of the complaint are set forth in the Appendix at page A- . International Dairy Queen, Inc. is the publically held parent of its chief domestic operating (franchising) subsidiary, American Dairy Queen Corporation. The complaint names these two Dairy Queen corporations and twelve other Dairy Queen corporations and unincorporated "Councils." Defendants Campbell-Mithun, Inc. and Cash Plus, Inc. are advertising agencies appointed by Dairy Queen. Defendants American Can Company, Bagacraft Corp. of America, The Continental Group, Inc., Continental Can Company, Inc., Dart Corp., Lind Plastic Products, Inc., Maryland Cup Corporation, Sweetheart Plastics, Inc., Owens Illinois, Inc., Plastics, Inc., Stewart Sutherland, Inc. and Union Carbide are or were "authorized" suppliers of paper, plastic products and containers to the plaintiffs and the franchisees. Defendants Allied Meat Company, Granite State Packing Company and

SchweigertMeat Company are "authorized" meat packers for the Dairy Queen system. Defendants Crowley Foods, Inc., Garden State Farms, Inc., Queens Farms Dairies and Upstate Milk Cooperative, Inc. are "authorized" ice milk and shake mix suppliers to the franchisees in upstate New York. Defendants Carter Paper Company, D.Q. of New Jersey, Hickman Coward & Wattles, Inc. Sysco Frosted Foods, Inc. and Worcester Quality Foods, Inc. are or were "authorized" warehouses for the franchisees. Defendants Cummings Incorporated, Econovent Systems, Inc., H.C. Duke & Son, Inc., Liqui-Box Corporation, Nieco Products, Inc. and Stoelting Bros. Mfg. Co., Inc. are or were "authorized " equipment suppliers to the franchisees. Defendant Hank Ketchum is a copyright licensor of certain cartoon characters which copyrights buttress the desirability of the Dairy Queen package of marks. Defendant Summit Travel Service was the approved travel agency for

certain purposes and defendant Travelers Indemnity Company, an -"authorized" insurance carrier to the system. Defendant Queens Jesters is a corporation organizing most of the named defendant suppliers for purposes not yet precisely known, but suspected by the plaintiffs to be in furtherance of the antitrust violations complained of. All of the other defendants are "authorized" suppliers of approved foods to the franchisees.

The petitioner here respectfully asks that this Court review the conduct of the District Court in summarily dismissing a private treble damage antitrust action. and to repudiate the inference left by the lower courts that there is a double standad of procedure in handling Sherman and Clayton act complaints-one standard for the mighty and one standard for the small businessman. Petitioner feels that she has been and is being denied both due process of law and equal protection of the laws;

perhaps worse-is being intimidated for the mere knocking on the door of justice. Expecting redress she is dealt blows.

Considering the actions of the District Court in summarily sanctioning petitioner's counsel with a fine of $1,000.00 payable in 10 days, then staying the sanction four days later, its ignoring of more than a thousand pages of documentary evidence and affidavits of record; its blind exclusion of important interrogatory evidence then in preparation; its failure to conduct the merest evidentiary hearing either initially or when the case was returned to it after the first appeal; its failure to issue the vaguest reasoned opinions justifying its rulings; together with its inexplicable attempts to punish plaintiffs' lawyer for the mere filing of their complaint, combined with the court of appeals' twice refusing to rule on the sanction question, presents a record so bizarre and eccentric as to warrant a

detailed review by this Supreme Court, which is responsible for the proper administration of justice throught the federal courts in the United States.

REASONS FOR GRANTING THE WRIT

1. The summary dismissal of private treble damage antitrust actions is against public policy.

This Court has repeatedly stated that an antitrust complaint should rarely be dismissed by summary means. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed.2d 458 (1962). The Court has also enunciated the most liberal interpretation of what must be alleged in an antitrust complaint to make it legally sufficient in Radiant Burners, Inc.v. Peoples Gas Light & Coke Co., 365 U.S. 656, 81 S. Ct. 365, 5 L. Ed.2d 358 (1961):

> "[T]o state a claim upon which relief can be granted under that section, (Sherman Act), allegations

> adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." 365 U.S. at 660, 81 S. Ct. at 367, 5 L. Ed.2d at 361.

This Court has held, that where that much is alleged the complaint cannot be dismissed. Here petitioner has more than met this standard. Any fair reading of the complaint would indicate that the plaintiffs have well pleaded numerous antitrust violations against the defendants. Moreover, affidavits and other documentary evidence on file exceeding one thousand pages establish that a solid foundation in fact exists underlying the allegations in the complaint.

The failure to permit an amended complaint on this kind of record directly ignores and conflicts with this Court's injunctions in Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed.2d 222,226 (1962):

> "Rule 15(A) declares that leave to amend 'shall be freely given

> when justice so requires'; this mandate is to be heeded. . . Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of discretion and inconsistent with the spirit of the Federal Rule."

2. The Court of Appeals' "informal" rulings below conflict with its own fully reasoned opinions, as well as those of other Circuit Courts of Appeal.

The Second Circuit has previously considered and ruled on the procedure employed by the District Court here in dismissing a complaint "without prejudice" in a fully reasoned opinion: Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445 (1978). There, in a per curiam opinion, the Second Circuit, including J. Oakes, a presiding justice below, that court found that it had jurisdiction to hear the appeal but disapproved of dismissals "without prejudice"

as Judge Munson did here:

> 'The district court's dismissal of the complaint 'without prejudice to its renewal' could certainly be read as an order granting the plaintiff leave to amend her complaint. However, we find it impossible to determine to any real degree of certainty what the district court intended. . . . 590 F.2d445 at 449. We also strongly suggest to the district courts that they use the terms 'with prejudice' or 'without prejudice' only when making a determination as to the res judicata effect of a dismissal. . . . Ibid. We so no point in imposing upon a plaintiff the burden of instituting a newe action and subjecting her to the risk of being unable to once again obtain personal jurisdiction over a defendant. . . . "
> 590 F.2d 445 at 450.

While the circuit court has expressly recognized the authority of This Court's decision in Poller v. Columbia Broadcasting, supra, and the policy announced there against summary dismissals, see Konik v. Champlain Valley Physicians' Hospital, CCH Trade Cases 1984-1 ¶ 65,962 at 68,154 (2d Cir. 1983) and Hayden Publishing Co., Inc. v. Cox Broadcasting Corp., 730 F.2d 64, CCH Trade Cases

1984-1 ¶ 65,897 at 67,826 (2d Cir. 1984), it has inexplicably failed to follow its own precedent here. A district court in the same circuit has however, recently followed and applied Poller correctly: Mon-Shore Management v. Family Media, Inc., 584 F. Supp. 186,CCH Trade Cases 1984-2 ¶ 66,323 at 67,394 (S.D.N.Y. 1984) as has the Sixth Circuit in Bender v. Southland Corp., 749 F.2d 1205, CCH Trade Cases 1984-2, ¶ 66,309 at 67,334 (6th Cir. 1984).

The circuit court also turned a blind eye to the line of precedent recognizing the possibility that a trademark in a franchising system may be the linch-pin in an arrangement violative of the antitrust laws as plaintiffs' complaint here alleges, neither discussing nor applying the line of cases represented by Susser v. Carvel, 332 F.2d 505 (2d Cir. 1964) cert. den. 381 U. S. 25 (1965); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir.) 405 U.S. 955 (1971); Warriner Hermetics,

inc. v. Copeland Refrig. Corp., 463 F.2d 1002 (5th Cir. 1972), cert. den. 409 U.S. 1086 (1972); Beefy Trail, Inc. v. Beefy King International, Inc., 348 F. Supp. 799 (M.D. Fla. 1972); Falls Church Bratwursthaus v. Bratwurst M. Corp., 354 F. Supp. 1237 (E.D. Va. 1973); International House of Pancakes Lit., 487 F. 2d 303 (1973); In Re Chock Full O' Nuts Corp., Inc., CCH Trade Cases ¶ 20,441 at 10,340 (FTC 1973); Serpa v. Jolly King Restaurants, Inc., 62 F.R.D. 626 (S.D. Cal. 1974); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459 (N.D. Cal. 1974); Detroit City Dairy, Inc. v. Kowalski Sausage Co., Inc., 393 F. Supp 453 (E.D. Mich. 1975); Hill v. A-T-O, Inc., 535 F. 2d 1349 (2d Cir. 1975); Poque v. International Industries, Inc., 524 F. 2d 342 (6th Cir. 1975); Milonas v. Amerada Hess Corporation, CCH Trade Cases 1976-2 ¶ 61,069 at 69,818; Matarazzo v. Friendly Ice Cream Corp., 70 F.R.D. 556 (E.D. N.Y. 1976); Carpa, Inc.

v. Ward Foods, Inc., 536 F. 2d 39 (5th Cir. 1976), aff'd in part revs'd in part,567 F. 2d 1316 (1978); Esposito v. Mister Softee, Inc., CCH Trade Cases 1976-1 ¶ 60,786 at 68,405 (motion for preliminary injunction granted) CCH Trade Cases 1976-2 ¶ 60,866 (motion for class certification granted); CCH Trade Cases 1976-2 ¶ 61,202 at 70,457 (motion to expand class denied) CCH Trade Cases 1980 ¶63,089 at 70,415 (liability established); CCH Trade Cases 1983-1 ¶ 65,336 at 70,001 (E.D.N.Y. 1983)(damages denied); Blanton v. Mobil Oil Corp.,721 F.2d 1207, CCH Trade Cases 1984-1 ¶ 65,765 at 67,139 (9th Cir. 1983); Corwin v. Los Angeles Newspaper Service Bureau, 94 Cal. Rep. 785, 484 P.2d 953, CCH Trade Cases 1971 ¶73,582 (Sup. Ct. Cal. 1971); Curry v. Steve's Franchise Co., Inc., CCH Trade Cases 1985-1 ¶66,421 at 65,108 (Dist. Mass. 1984); Mid-western Waffles, Inc.v. Waffle House, Inc., 734 F.2d 705, CCH Trade Cases 1984-2 ¶ 66,067

at 65,923 (11th Cir. 1984); Photovest v. Fotomat Corp.,CCH Trade Cases 1977-1 ¶ 61, 529 at 72,087 (S.D.Ind. 1977); State of New Jersey v. Lawn King, Inc.,377 A.2d 1214,CCH Trade Cases 1977-2 ¶ 61,635 at 71,666 (Sup. Ct., Law Div., Mercer Co. 1977); Young v. Jo-Ann's Nut House, Inc., CCH Trade Cases 1980-2 ¶63,746 at77,966 (Dist. of N.J. 1980) and State of New York v. Carvel Corp., CCH Trade Cases 1984-1 ¶ 65,926 at 67,992 (1984), 192 N.Y.L.J. No. 74, page 7, CCH Trade Cases 1984-2 ¶ 66,248 at 67,071 (1984),CCH Trade Cases 1985-1 ¶ 66,492 at 65, 456 (Sup. Ct., N.Y. Co. 1985), where the State is proceeding on the theory that Carvel is in violation of the Donnelly Act in tying seven items to its "Carvel Retail Manufacturing License" : (1) commessary, (2) supplies,(3) equipment, (4) store leases, (5) sundry services and sundries, (6) opening inventory and (7) the Carvel ice cream freezer front plate.

Fining an attorney attempting to file an

antitrust complaint without a fully developed record; without an evidentiary hearing; without a reasoned opinion and without any finding of bad faith is unprecedented as the presiding judge at the Second Circuit commented at the oral argument of the first appeal. The procedure employed by the District Court is in total conflict with the leading case in the Second Circuit and the procedures laid down there, Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980) and 704 F.2d 652 (1983). It is also calculated to stifle possible just antitrust claims by striking fear into plaintiffs' counsel. It is a very old and strong policy of our government to encourage, not discourage private antitrust enforcement. This is why attorneys fees are awarded the successful plaintiff and never awarded to the successful defendant. Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3rd Cir. 1967). Permitting sanctions against plaintiffs' counsel,

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especially where, as here, not warranted beyond peradventure of doubt, equally acts as an inhibition on bringing private antitrust actions, and should be held against public policy.

Dismissing an antitrust complaint on the shadowy and insubstantial technicality of Rule 8 of the Federal Rules of Civil Procedure without permitting amendment of the pleading is an application of legal princple worthy of a Draco but unexpected in a United States Judge in the last quarter of the twentieth century. Such unexplained action does particular violence to Rule 1's injunction that all rules be construed to secure the "just, speedy, and inespensive determination of every action," and Rule 15's mandated that a pleading shall be permitted to be amended "freely . . . . when justice so requires." In fact it offends the very spirit of Rule 8 itself -Rule 8(c) "Construction of Pleadings. All pleadings shall be so

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construed as to do substantial justice." Such a ruling is a throwback to the nineteenth century rules of technical pleading, which approach was clearly rejected in the adoption of the modernized Federal Rules, even as Rule 8 again enjoins- Rule 8(e) . . . "No technical forms of pleading . . . are required." On the interpretation of Rule 8, see generally 2A Moore's Fed. Prac. 2d ed. ¶8.17(3) et seq., and see Karlinsky v. New York Racing Association, 52 F.R.D. 40 (S.D. N.Y. 1971),amended complaint dismissed after trial, 517 F.2d 1010(1975). After J. McMahon dismissed the original complaint with leave to amend under Rule 8, J. Lasker, held (at 43):

> "At the outset it may be noted that the question of compliance with the Rule 8 requirement of conciseness is not to be judged by the length of the complaint as stated in 2A Moore's Federal Practice, 2d ed. 1708."

Another text writer has also affirmed the proposition that "the shortness or length of a complaint is not determinative of its sufficiency." 16H, Business Organization,

Von Kalinowski, Antitrust Laws and Trade Regulation § 105.01 at 105-4.

In the proper exercise of its discretion the court should weigh any prejudice that might result from its denial of leave to amend.*** See Dussouy v. Gulf Coast Inv. Corp., 660 F.2d594 (5th Cir. 1981). The district court cited, without explaining that he was invoking Local Rule 7 in support of his dismissal order. Plaintiffs and counsel believe that their papers comply with Local Rule 7 and it is a matter of record that no defendant has complained in its answer or moving papers that Local Rule 7 was violated. No defendant has asserted that the complaint is not legible. Neither Local Rule 7 nor any Federal Rule of Civil Procedure specifies that a complaint need be either single or double spaced. In any

***As here, where plaintiff risks losing at least two years of damages on statute of limitation grounds as well as the loss of personal jurisdiction over some 70 defendants against some of whom the statute may have completely run if a wholly new action must be initiated.

event these issues have nothing whatever to do with the merits of the case and should not be used to prematurely abort a private antitrust action by refusing to receive and evaluate the merits of both evidence of record and evidence called for by plaintiffs' first set of written interrogatories served with the complaint.

Finding no support in law for the summary dismissal of the complaint either in Rule 11 or Rule 8 or Local Rule 7, the court might have been justified in dismissing it under Rule 12 for failure to state a cause of action. This it did not do, nor did it cite Rule 12 for authority in dismissing it on any other ground. Nor does the district court rely on Rule 56.

3. The Court of Appeals' "informal" rulings ignore Copperweld Corp. v. Independence Tube Corp.

In Copperweld Corp. v. Independence Tube

Corp., ___U.S.__, 104 Sup. Ct. 2731, 81 L. Ed.2d 628, 52 USLW 4821, CCH Trade Cases 1984-2 ¶66,065 at 65,901 (1984) this Court ruled that a wholly owned subsidiary could not conspire with its parent to violate the Sherman Act § 1, but that such a combination would lack the requsite plurality of actors to make out a required bi-lateral violation under that provision. Plaintiff's complaint was legally sufficient both before and after the Copperweld decision, although the decision has made redundant the joinder of some 21 subsidiaries of defendant parents. Moreover, the validiity of proceeding against illegal combinations between wholly owned subsidiaries and third parties is augmented by Copperweld, 104 S. Ct. 2731, 81 L. Ed.2d 640, 52 USLW 4825, CCH Trade Cases 1984-2 at 65,906, note 9, since if parent and subsidiary are one economic unit for defensive purposes, they must be one economic unit for liability purposes, as in "Perma Life Mufflers, Inc.

v. International Parts Corp., 392 U.S. 134 (1968)," where a parent corporation and three subsidiaries conspired to impose various illegal restrictions on plaintiff franchisees. 104 S. Ct. 2731, 81 L. Ed.2d 640, 52 USLW 4825, CCH Trade Cases 1984-2 at 65,907.

The Courts below have ignored the now changed pleading requirements and near mandatory joinder of the unaffiliated supplier defendants wrought by the Copperweld decision in order to make out a § 1 violation. The district court was clearly of the view that the joinder of the non-Dairy Queen defendants was redundant and therefore "frivolous." Copperweld has however squarely refuted that view, making mandatory what the district court below viewed as "frivolous" joinder.

In Tunis Brothers Co., Inc. v. Ford Motor Co., CCH Trade Cases 1985-1 ¶66,633 at 66,124 (3rd Cir. 1985) decided after Copperweld, a plaintiff franchisee's Sherman Act action

against its defendant franchisor was dismissed by the district court by summary judgment. The third circuit reversed and remanded, finding that the trial court had also abused its discretion in dismissing pendent state common law breach of contract and tort claims. There there were three corporate defendants and eight individual defendants. There, as here, the plaintiffs argued that

> "The district court erred in holding that there is no evidence of a conspiracy under section 1 of the Sherman Act. Second, they argue that the district court erred in holding that the franchise agreement does not violate Section 1 of the Sherman Act. Finally, they argue that the district court abused its discretion in dismissing the pendent state law claims. " Id. at 66,127 note 10.

In reinstating the Sherman Act claims the circuit court noted that

> "conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiracy. See Associated Press v. United States (326 U.S. 1, 12-13 (1945). Those who, with knowledge of the conspiracy aid or assist in conspiring at the

> purposes of the conspiracy make themselves parties thereto and are equally liable to or guilty with the original conspirators.[16]
>
> "16
>
> Co-conspirators need not be intimately familiar with each and every detail of the conspiracy. A conspirator need not know all the other conspirators, nor have direct contact with them, and evidence of such knowledge is not essential. Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1944); United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944). 'A plaintiff need not show that the defendant participated in every transaction or even that he knew the identities of his alleged conspirators or the precise role which they played. ' United States v. Kates, 508 F.2d 308 (3rd Cir. 1975) (footnotes omitted)." CCH Trade Cases 1985-1 at 66,129 & note 16.

Continuing to interpret Copperweld, the court held that concerted action under Sherman § 1 could not be sustained by alleging conspiracy between Ford and Ford Credit Corporation but could be sustained by alleging a conspiracy between Ford and Wenner Ford where "Wenner Ford is not wholly owned." Id. at 66, 132- 66,133 at note 20.

The Tunis Brothers language is evocative of the charge to the jury in Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 900 (Dist. Mass. 1954):

> "In order to succeed, the plaintiff does not have to show you that every one of the defendants was in the conspiracy, but it does have to show you that more than one of the defendants was in the conspiracy." Id. at 908

Susser v. Carvel, supra, the leading fast-food franchise case yet decided by the Second Circuit is of particular interest because the Carvel business and system so closely parallels that of Dairy Queen yet is distinguishable from it. Interestingly, the Carvel trial judge, j. Dawson, applied this Court's Copperweld rule 20 years before it was announced here. See Cases and Briefs of the U.S. Circuit Court of Appeals, 2d Circuit (1964 Term), Vol. 5345 at Appendix to Appellants' brief, page 46a: where the district judge did not receive evidence of conspiracy between the Carvel corporations. He stated: "I am regarding them as an entity."

4. Plaintiff's Complaint is both legally sufficient and factually supported by evidence of record.

Market Power and Leverage -Dairy Queen has amassed sufficient market power and leverage in its trademarks and associated marks and copyrights to raise a legal presumption of dominance sufficient to impose the tie-ins plaintiffs complain of and plaintiff requests that this fact be judicially noticed. By comparison

> "The (Carvel) plaintiffs made no showing, as ordinarily required under the cases, that Carvel occupies a dominant position as a franchisor of soft ice cream or seller of ice cream freezers or even that a substantial amount of commerce in the 'tied' product was foreclosed." Id. at 66a, 67a.

The Carvel system involved a total retail annual sales volume of from $6,000,000 to $8,000,000, as against the Dairy Queen figure of $1,000,000,000. The total number of stores in the chain were about 1/10th the number in the Dairy Queen system- between

350 and 400 outlets. Id. at 34a. Carvel operated in 9 states in the Northeast, and it was stipulated that the relevant market was "New Jersey, New York, Pennsylvania, Massachusetts and Connecticut." Ibid.

> "The (Carvel) plaintiffs, presumably in accordance with their per se theory of illegality offered no evidence as to the relevant market nor did they show that competition was substantially lessened." Id. at 71a.

Two Products.-The tied lines of commerce are separate and distinct from Dairy Queen's trademarks and franchise. The plaintiffs in Susser v. Carvel on the other hand were not even proceeding on the theory that the franchise and trademarks were the tying products.

> "plaintiffs in their post-trial brief do not assert that the franchise is a tying device but advance the theory that in addition to the freezers the front assembly plate from the freezers (which happens to be patented and which is leased to the operators) is a tying product. This attempt to bring in an incidental patented article as a tying device as to which 'dominance' may be presumed is unrealistic and cannot be accepted. This opinion proceeds on the basis of plaintiffs' other contention that the dispensing freezers sold by Carvel are the tying articles." Id. at 63a,note 7.

> "The Carvel trademark applies to ice cream, the end product which was sold to the public was Carvel ice cream, and it was this product to which the Carvel Trademark and good will attached." Id. at 65a.

The Carvel decision was limited to the one product line of ice cream and Carvel machines dispensing it under the analogue FTC v. Sinclair Refining Co., 261 U.S. 463 (1923), where Sinclair tanks and pumps were required in which to sell Sinclair gasoline. The Dairy Queen operation is not limited to ice cream. Many lines of commerce are affected.

Coercion.- Dairy Queen has enforced their tie-ins by active, systematic and harsh acts of coercion, whereas in Carvel there was no evidence that the contract provisions were enforced by terminations or threats of termination, but only by injunctive action and threats thereof. Cases and Briefs, Susser v. Carvel, supra, at 69a. Dairy Queen systematically employs both threats of termination and brutal terminations to keep discipline in

their "system."

For example, the four franchisees in central New York were terminated. Three of their affidavits are appended. See the O'Leary, Gerwitz and Briant affidavits at A-88, A-71, and A-68, respectively. Other terminations are detailed in the Record on Appeal and Enclosure "T" to the King Affidavit. In exaggerated aggressiveness the plaintiff Gukthrie was even forced out of business in connection with a non-Dairy Queen operation in a separate community. See the Affidavit of the Petitioner and Exhibits thereto at A-81, et seq.

In Carvel no Carvel franchisee ever requested to be permitted to buy paper products other than from Carvel, (Id. at 46a) and the Carvel post-1955 franchise agreement provided that

> "in the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in

> accordance with Carvel standards." Id. at 62a.

No such flexibility is pemitted under the Dairy Queen system. All paper goods and plastic products imprinted with the Dairy Queen marks must be purchased from and through Dairy Queen. Dairy Queen rigidly controls the manufacture and sale of all cones, cups, lids, and paper and plastic goods bearing its marks, and it has arranged to monopolize this business among the franchisees.

> "[T]here. . .[was] no evidence that the Carvel operators. . .[were] particularly interested in selling other kinds of ice cream," Id. at 70a.

in contrast to the desires of the Dairy Queen franchisees. Dairy Queen coercion to accept the tie-ins is accomplished by means of (1) contract provisions requiring the franchisee's purchase of Dairy Queen brand products; (2) official product lists controlling all products Dairy Queen views as lawful; (3) periodic company policing inspections of stores

followed by ominous warnings of any deviation from this approved list,

(4) threats of termination for non-compliance and (5) outright termination. See generally the King Affidavit at A-23.

Concerted Refusal to Deal.- The record raises a strong inference of a well organized group boycott, both multi-lateral and multi-state in character. Not less than seventeen defendants have engaged in an apparent horizontal concerted refusal to deal with the petitioner: Fisher Nut Company, Beck Vanilla Products Company, Commercial Testing Laboratory, Inc., George & Thomas Cone, Inc., J. Hungerford Smith Company, Iceland Seafood Corporation, Interstate Distributors, Inc., Standard Foods, Inc., Suzanna's Kitchen, Inc., Ward-Johnston, Inc., Victdor Foods, Inc., Bagcraft Corp. of America, Lind Plastic Products, Inc., Sweetheart Plastics, Inc., Owens-Illinois, Inc., Plastics, Inc. and Carter Paper Company.

An official of defendant Ward-Johnston has stated that "they do not ship to individual Dairy Queen stores." A-58A. An official of defendant Lind Plastic Products, Inc. said "that his contract with Dairy Queen precludes him from selling to anyone but the franchisor." A-58A. Defendant Owens-Illinois will not sell to Dairy Queen franchisees directly. A-59. Defendant Interstate Distributors would not sell to franchisees "out of the area." " The whole Southwestern United States." Defendant Iceland Seafood couldn't "sell to anyone but authorized warehouses." Defendant Beck Vanilla Products Co. would not sell to franchisees because Dairy Queen "won't let them sell to individual stores as the billing has to go through IDQ." A-59.

Defendant George and Thomas Cone Co. refused to sell to the franchisees. A-61. Defendant Hunt-Wesson Foods, Inc. "do(es) not ship to individual Dairy Queen restaurants." Food Service Systems, an approved Dairy

Queen supplier, not joined as a defendant, admitted that "there's a sort of 'gentlemen's agreement' whereby they don't step on each others toes." (I.e. among the Dairy Queen suppliers) Defendant Victor Foods "could not sell to individual Dairy Queen stores." Defendant Standard Foods refused to deal with the plaintiffs. Defendant Carter Paper Company refused to deal. A-64.

Defendant Bagcraft Corp. of America refused to deal with the plaintiff because "Dairy Queen dictates what we can do." Jordan Meat Company, an authorized Dairy Queen meat supplier, not joined in this action, admitted "he could not sell to an individual Dairy Queen store directly." and defendant Maryland Cup Corporation (Fort Howard Paper) would not sell Dairy Queen goods through defendant Worester Quality Foods. A-50. Compare these statements with the remarkable assertion contained in the Dairy Queen

approved prodcts list, an official Dairy Queen publication: "[Y]ou may purchase the approved products from any source you desire." (Emphasis added.) A-91.(1983), an official falsehood repeated to franchisees since at least 1971. See Appendix at A-93and A-96. A falsehood repeated under oath by a Dairy Queen executive Vice-President in an earlier case. See Appendix at A-102.

Why the supplier defendants "do not deal with Dairy Queen franchisees directly" is less obvious, but made clear with reference to Dairy Queen's secret supplier agreements contractually foreclosing such direct sales while mendaciously telling its franchisees that they are permitted. See, e.g., Agreement with Iceland Seafood at A-98.

Scienter and Secret Supplier Agreements.- Unknown to the franchisees, Dairy Queen has bound the "authorized" manufacturers to sell all Dairy Queen brand products to it for

exclusive re-sale and profit to its "authorized warehouses." See the Iceland Seafood (Products), Inc. "Distributorship Agreement" in the Appendix at A-98. Of course since franchisees deal only with the warehouse they would have no way of knowing that Dairy Queen had conspired with the primary manufacturers and the warehouses to prevent their direct sale of Dairy Queen products to them. They would simply find as did the petitioner here that the Dairy Queen products are not available except through the warehouses as a screen for the forced sales from the franchisor.

However, if the franchisees are deprived of this knowledge, the authorized suppliers are not and they have guilty knowledge or <u>scienter</u> concerning the illicit transactions. A similar argument was made by plaintffs' counsel in Carvel: Plaintiffs' counsel in Carvel correctly urged that

> "in view of the evidence (3687) before you you can fairly and justly draw an inference that Eagle Cone and other suppliers involved here entered into

> their respective contracts with Carvel with full knowledge and 'contemplation of Carvel's franchise agreements.' " Cases & Briefs, Susser v. Carvel at 13e.

Plaintiffs here too urge that scienter of this kind must be attributed to the Dairy Queen supplier defendants. In Carvel at ¶ 15 of the affidavit of Martin Cain, Sales Manager of Eagle Cone, this witness stated: "Neither of the plaintiffs ever asked me in 1955 or at any other time for direct supply and billing." Ibid.

Petitioner here has asked and been repeatedly refused. See the Affidavits of John and Gwen Putman at A-49, whereas the Carvel record showed that

> "No evidence of any such conspiracy (among the supplier defendants) was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracy." Id. at 57a, and that "Plaintiff failed to prove that any of the supplier defendants were asked to make sales of unapproved merchandise and that they refused to do so." Id.at 59a.

Also in Carvel at the brief of Eagle Cone (Id. at 1e) defendant's counsel argued that there was

> "not one scintilla of evidence. . . proffered by the plaintiffs here to show any agreements between Eagle Cone and Carvel, that Eagle did not deal directly with dealers. Your Honor will also note that the contracts did not provide anywhere therein that Eagle would not deal directly with plaintiffs. . . .Id. at 7e.

Contrast this with the abundant evidence of record showing the Dairy Queen and the Dairy Queen suppliers' concerted refusal to deal except through Dairy Queen and the Dairy Queen "system." Very importantly- "There is no indication that Carvel reaped any profit itself from any of the tie-ins." (Emphasis added.) Id. at 66a. Dairy Queen on the other hand reaps profits and secretly in many respects in the multi-millions of dollars annually from their tie-in programs. In any event the tie-ins in Carvel were determined not be illegal per se, which was the sole theory of law on which the

plaintiffs there relied. Id. at 66a.

> "Carvel is not, by these restrictions taking any business for itself at the expense of its competition and no injury to competition is shown." Id. at 69a. "Carvel. . . [was] not in the business of manufacturing ice cream mix, cones or napkins. The exclusive dealing provisions as to these products are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields." Id. at 70a.

Dairy Queen on the other hand is primarily concerned with the quality of their controls, not control of quality, and legally trained minds reel in the face of an obvious concerted refusal to deal in support of the Dairy Queen tying and exclusive dealing arrangements.

Plaintiff here, like the plaintiffs in Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1977), Trade Cases 1977-2, ¶ 61,568 at 72,288 at 72,295- "argue that the complaint fairly read as a whole alleges a 'combination', and that such an allegation combined with a statement of the specified course of conduct alleged to be unlawful

clearly states a claim. We agree."

An older pleading case, a film distribution case, is perhaps more illustrative of Mrs. Guthrie's position than some more recent cases, having antedated the franchising wave of the sixties and seventies.- Majestic Theatre Co. v. United Artists Corporation, 43 Fed.2d 991 (Dist. Conn. 1930). Plaintiff was a movie house in Hartford Connecticut; defendants Connecticut film distributors. The leading U.S. film distributors, including the defendants, had adopted a form contract, the "Standard Exhibition Contract" in 1926, and were unwilling to contract with exhibitors except in that form. Id. at 992. This policy is analagous to Dairy Queen's and other franchisor's refusal to deal with prospective franchisees unless they sign or re-sign a "Standard Form Operating Agreement." Like the Dairy Queen-Guthrie present operating agreement the film industry's Standard Exhibition Contract provided for a broad

arbitration clause. Id. at 993. One defendant, the New Haven Board of Trade, distributed films to the entire state of Connecticut. All movie houses in Connecticut had to deal with a distributor who was a member of the board. The Dairy Queen analogue is that all Dairy Queen franchisees in a given region are required to deal with one central warehouse-for example, defendant Granite State Packing Company of Manchester, New Hampshire. The district court ruled that plaintiff's complaint charging all Connecticut film distributors had entered into an illegal "combination to enforce the 'Standard Exhibition Contract' " and its arbitration clause, was legally sufficient. Plaintiff (like many Dairy Queen franchisees) was forced to close his theatre in 1927, because of the defendant's restraints and the court found that the purpose of the refusal to deal was to "force plaintiff and any other exhibitor in Connecticut to agree to arbitra-

tion in accordance with the terms of the standard contract." Id. at 995.

The enforcement policy of the member distributors was ruled violative of the Sherman Act. Both the objects of the distributors' policy and the means of enforcement were both illegal and "for these acts the members selected for suit are liable." Id. at 996.

The closing lines of this 1930 opinion were:

> "If an industry having an essential monopoly in a particular community could require persons wishing to engage in business to enter into a form of contract which might provide for any form of restraint of interstate commerce, the will of Congress as expressed in the anti-trust laws could be nullified. This not the law and private contracts cannot be resorted to for that purpose. Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed.136."

RECORD ON APPEAL

Petitioner urges the Court to order the transmission of the Record on Appeal from the Second Circuit in evaluating the instant

petition. Evidence of record exceeding one thousand pages (See Partial Index in Appendix at A-47.)fully documents the factual basis for plaintiffs' complaint, whereas neither the District Court nor the Second Circuit Court of Appeals has commented on as much as one item of evidence. The record contains nine(9) affidavits supporting the abundant factual basis for plaintiff's action. These affidavits are reproduced, in relevant part, in the Appendix to this petition. Where "undisputed facts disclose a violation of the statute . . ." certiorari is warranted. See Arizona v. Maricopa County Medical Society,457 U.S. 332 at336, 102 S. Ct. 2466 at 2466, 73 L. Ed.2d 48 at 53 (1982).

CONCLUSION

The petitioner prays that this Court grant a Writ of Certiorari to review the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

Robert B. Shaad,
Attorney of Record
Thomas A. King, Of Counsel

----------APPENDIX ----------

U.S. District Court
N.D. of N.Y.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

March 5, 1984

PAUL M. FENNESSY and AUDREY E. GUTHRIE Individually and as Executrix of the Estate of Wallace D. Guthrie, Deceased,

Plaintiffs,

v.

INTERNATIONAL DAIRY QUEEN, INC., et al.,

Index No. 83CV1720

ORDER

Defendants.

HOWARD G. MUNSON, C.J.

ORDER

Upon consideration of the defendants' motion for dismissal and/or for sanctions and the plaintiffs' motion for an Order pursuant to Fed. R. Civ. P. 5(c) regarding the service of papers; and upon consideration of the complaint and all affidavits, memoranda and exhibits submitted in support and in opposition thereto; and upon consideration of the oral arguments of plaintiffs' counsel and of

counsel for the various defendants on March 12, 1984; it is hereby

ORDERED that, pursuant to Local Rule 7 and Federal Rules 8 and 11, the complaint is dismissed without prejudice as to all named defendants; and it further

ORDERED that, pursuant to Federal Rule 11, Thomas A. King, counsel for plaintiffs, is fined the sum of One Thousand Dollars ($1,000.00), payable to the Clerk of the United States District Court of the Northern District of New York on or before March 22, 1984.

Dated: March 15, 1984
Syracuse, New York

Howard G. Munson
Chief U.S. District Judge

U.S. District Court
N.D. of N.Y.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

March 5, 1984

PAUL M. FENNESSY and AUDREY E. GUTHRIE Individually and as Executrix of the Estate of Wallace D. Guthrie, Deceased,

Plaintiffs,

v.

INTERNATIONAL DAIRY QUEEN, INC., et al.,

Index No. 83-CV-1720

ORDER

Defendants.

Upon reading the application and motion for a stay of the execution of a certain fine of $1,000.00 herein on Thomas A. King, attorney for plaintiffs, announced in open court on March 12, 1984 and due and payable on March 22, 1984, and upon reading the affidavit of attorney King in support of said application for a stay, and considering and provided that a timely notice of appeal is filed, perfected and prosecuted herein, then it is,

ORDERED, that the fine of $1,000.00 imposed on attorney King and the execution thereof is stayed until the determination of the appeal by the Second Circuit Court of Appeals in this matter, from this Court's Order dismissing the complaint in its entirety.

Dated: March 19, 1984
Syracuse, New York

Howard G. Munson, U.S. Dist. Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of October, one thousand nine hundred and eighty-four.

United States Court of Appeals
filed
October 15, 1984
Elaine B. Goldsmith, Clerk
Second Circuit

Present:

Hon. James L. Oakes,
Hon. Amalya L. Kearse,
Hon. George C. Pratt,
Circuit Judges.

Paul M. Fennessy and Audrey E. Guthrie, individually and as executrix of the Estate of Wallace D. Guthrie, Deceased,
Appellant

v

International Dairy Queen, Inc., and d/b/a IDQ Distributors Dairy Queen Supply and FSI, et al.,
Appellees.

ORDER

Appeal from dismissal of complaint by the United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, pursuant to Fed. R. Civ. P. 8 and 11 and Rule 7 of the General Rules

of the United States District Court for the Northern District of New York. Attorney Thomas A. King also seeks by this appeal to set aside so much of the court's order made pursuant to Fed. R. Civ. P. 11 fining him $1,000, which order was stayed pending this appeal.

It appearing on argument that an outstanding counterclaim has not been ruled upon and no certificate under Rule 54(b) having been filed, this court is without jurisdiction to hear the appeal.

Appellees' motion for attorneys' fees on this appeal is denied.

Appeal dismissed.

N.B. Since this statement does not consitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reprted, cited or otherwise used in unrelated cases before this or any other court.

Circuit Judges

U.S. District Court
N.D. of N.Y.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

FILED
JUN 19,1985
J.R. SCULLY, Clerk
Syracuse

PAUL M. FENNESSY and AUDREY E. GUTHRIE Individually and as executrix of the Estate of Wallace D. Guthrie, deceased,

Plaintiffs,

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Defendants.

ORDER

Index NO. 83CV1720
(Judge Munson)

HOWARD G. MUNSON, C.J.

This Court having wholly dismissed plaintiffs' complaint against all defendants on March 15, 1984 and having entered a written order to that effect on March 15, 1984 and having concurrently ordered plaintiffs' counsel sanctioned with a $1,000.00 fine by the same decision and order and thereafter on March 19,1984 having stayed the imposition of said sanction pending plaintiffs' appeal,

Now, upon consideration of the Second Circuit Court of Appeals' dismissal of the appeal for lack of finality of the District Court's orders by reason of an outstanding unresolved counterclaim of defendant Upstate Milk Cooperatives, Inc. on October 15, 1984, by reason of non-compliance with Rule 54(b) FRCP, and the case having been re-noticed for hearing in This Court on May 7, 1985 and being in receipt of correspondence from the defendant Upstate Milk Cooperatives, Inc. withdrawing said counterclaim(s) and otherwise being fully advised of the law and the facts in the premises, it is hereby,

ORDERED, that this Court's rulings herein of March 12, 15 and 19 are hereby re-affirmed and the counterclaim(s) set forth in the answer of defendant Upstate Milk Cooperatives, Inc. is (are) hereby dismissed.

Dated: Syracuse, New York
June 19, 1985

Howard B. Munson, D.J.

United States Court of
Appeals
Filed
Jan 17 1986
Elaine B. Goldsmith
Clerk-Second Circuit

UNITED STATES COURT OF APPEALS FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January, one thousand nine hundred and eighty-six.

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE GEORGE C. PRATT

Circuit Judges

HONORABLE CHARLES E. WYZANSKI, JR.*

District Judge

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, Individually and as Executrix of the Estate of Wallace D. Guthrie, Deceased,

Plaintiffs,

AUDREY E. GUTHRIE,

Plaintiff-Appellant,

ORDER

Docket No. 85-7609

-against-

INTERNATIONAL DAIRY QUEEN, INC. ET AL.,

* United States District Judge for the District of Massachusetts, sitting by designation.

Defendants-appellees.

Paul M. Fennessy and Audrey E. Guthrie appeal from an order that dismissed their complaint without prejudice and imposed sanctions on their counsel to be paid into the court pursuant to Fed. R. Civ. P. 11 entered March 15, 1984 in the United States District Court for the Northern District of New York (Munson, CH.J.).

Appellants are two Dairy Queen franchisees. They commenced this private treble damage antitrust action against International Dairy Queen, Inc., several other "Dairy Queen" defendants, and more than 70 additonal defendants, most of whom are suppliers or former suppliers of materials or food products to Dairy Queen franchisees. Chronologically,

this action followed an October 1983 arbitration award in favor of appellee Dairy Queen Corporation against appellants for falsifying reports of their sales and of royalties based on these sales. Appellants have not satisfied the $3000 judgment and appellees allege the instant action was commenced to avoid paying the arbitration award and to force a settlement.

The district court was well within its discretion in dismissing the complaint without prejudice under Fed. R. Civ. P. 8 and Local District Court Rule 7. Appellants' pleadings were not simple, concise and direct but confused, vague, and prolix. No arguable basis exists to believe that appellants could prevail against the vast majority of the defendants named in their complaint. Appellants do not allege how most of the named defendants are implicated in this litigation. Further, the record discloses that several of the corporate defendants do not exist.

Appellants argue that they should have been given an opportunity to amend their complaint pursuant to Fed. R. Civ. P. 15(b). But appellant never requested such an opportunity before the district court.

Appellants ask us to vacate the district court's award of sanctions. The district court directed that the sanctions were to be paid to the Clerk of the Court, and not to the appellees. Appellees are the only parties joined in this appeal, and they have no interest in the fine imposed upon the appellants but payable to the court. Because appellants have not joined the court as a party to this appeal, we lack jurisdiction to review the imposition of sanctions in this case, and therefore, we do not address it.

The order is affirmed.

The motion to impose costs and attorneys' fees on appellants for filing this appeal is denied.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Richard J. Cardamone,
U.S.C.J.

George C. Pratt, U.S.C.J.

Charles E. Wyzanski, Jr.
U.S.D.J.

THE MAIN ALLEGATIONS OF THE COMPLAINT

¶ 14: "From in or about January of 1980, continuously through December of 1983, and prior to such period from at least January of 1978, Dairy Queen and their Dairy Queen System Suppliers violated §§ 1 & 2 of the Sherman Act by conspiring, combining, contracting and arrangeing to monopolize a part of the trade and commerce among the several states and internationally, in that these defendants combined and arranged in a plan to monopolize the market in wholesale goods, foods and supplies among Dairy Queen franchisees, particularly combining to monopolize such trade in the Northern New York region. (generally, that portion of the State of New York lying north of the Mohawk river, Oneida lake, and the Oneida and Oswego rivers.)"

¶ 24: "From January of 1980 (and for many years prior thereo, from at least January of 1978) continuously through December of 1983, Dairy Queen and the Dairy Queen System Suppliers violated § 1 of the Sherman Act by illegally tying and conditoning the licensing of a mass of intellectual properties (hereinafter called their "intellectual Property Package"), detailed below,[3] (Tying Product) on plaintiffs' hiring of advertising services through Dairy Queen at a cost of 3 % or more of gross retail sales (Tied Product)."

¶ 29:"From January of 1980 (and for many years prior thereto, from at least January of 1978) continuously, through December of 1983, Dairy Queen , aided and supported by the Dairy Queen System Suppliers, violated § 1 of the Sherman Act, by illegally tying the licensing of their Intellectual Property Package (Tying Product) to plaintiffs' purchase of various ice milk products, edible cones, meats, nuts, syrups, toppings, cups, lids, paper cartons, napkins, plastic products, dishes and other necessary supplies needed in plaintiffs' business (Tied Products) from an unreasonably restricted group of suppliers designated by Dairy Queen, or from Dairy Queen itself."

¶34: "From January of 1980 (and for many years prior thereto, from at least January of 1978) continuously, through December of 1983, Dairy Queen, together with their Dairy Queen System Suppliers, while specifically intending to destroy competition in the wholesale market for food and supplies required by Dairy Queen franchisees, attempted to monopolize ;such trade and commerce in violation of § 2 of the Sherman Act."

¶39:"From January of 1980 (and prior thereto, from at least January of 1978) continuously, through December of 1983, all defendants have monopolized the trade and commerce in wholesale foods and supplies to Dairy Queen franchisees in the Northern New York region in violation of § 2 of the Sherman Act."

¶42:"From January of 1980 (an prior thereto from at least January of 1978), continuously through December of 1983, Dairy Queen and the Dairy Queen System Suppliers violated § 1 of the Sherman Act and § 3 of the Clayton Act, by illegally and unreasonably restraining interstate trade in certain goods and commodities, in that Dairy Queen combined and agreed, by means of their form franchise agreements and by the manner in which they enforced compliance with the same, aided by the Dairy Queen System Suppliers, so that their franchisees generally and the plaintiffs in particular were prohibited from selling and offering for sale the following items: (Subparagraphs a. through kk. itemizing specific categories of foods eliminated)

¶46:"From January of 1980 (and prior thereto from at least January of 1978), continuously, through December of 1983, Dairy Queen and the Dairy Queen System Suppliers, by means of their form franchise agreements and otherwise, illegally restrained trade by combining and agreeing to foreclose plaintiffs ability to license or use other trademarks, tradenames or other intellectual properties than those of Dairy Queen.

¶50:"From January of 1980 (and prior thereto from at least January of 1978), continuously through December of 1983, Dairy Queen and the Dairy Queen System Suppliers entered into and maintained, in violation of § 1 of the Sherman Act, numerous contracts, agreements, schemes and arrangements and combinations among themselves the substantial terms of which was to have been and are:

"To horizontally allocate and divide (a) the wholesale market for supplies to Dairy Queen franchisees throughout the United States and abroad, generally, and (b) specifically, in the Northern New York region, to horizontally allocate Dairy Queen franchisees in the same areas as wholesale customers."

¶54:"In or about August of 1980 Dairy Queen unreasonably restrained trade and commerce in violation of common law, § 340 of the N.Y. General Business Law and § 1 of the Sherman Act, as well as § 3 of the Clayton Act, by coercing and intimidating plaintiff Guthrie from operating an independent restaurant business called "Eskimo" in Canton NY and/or on the plaintiff's own property at 193 East Main Street, Gouverneur, New York in the Northern District of New York, and prevented that plaintiff from selling food at such locations by means of threats of termination of her Canton Dairy Queen franchise and threats of injunctive action for violation of her Dairy Queen franchise agreement with Dairy Queen, from the fall of 1980 to the date of this complaint and presumably hereafter."

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.

Plaintiffs,

Index No. 83 CV 1720 (Judge Munson)

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Defendants.

AFFIDAVIT

ENCLOSURE "K"

(Exhibits Omitte

STATE OF NEW YORK)
: ss.:
COUNTY OF ONONDAGA)

Thomas A. King, first having been duly sworn deposes and says;

1. I make this affidavit in opposition to the motions of the Dairy Queen defendants herein now returnable on March 12, 1984.

2. The exhibits referred to herein are enclosed herewith separately bound and marked "Enclosure & Exhibit."

Market Power and Leverage

3. To make out a case for tying plaintiffs

must show that defendants have sufficient power and leverage in the tying product to impose the tie-in with respect to the tied product.

4. Dairy Queen's dominance in the fast food business and the economic value and desirability of the "Dairy Queen/brazier" and associated marks has unquestionably sufficient economic power to be a tying product. Dairy Queen is a large, public, international company, Exhibit M-1, and as early as 1972 had amassed a chain of 4,174 stores, Exhibit M-1, page 22. However, Dairy Queen is not in the restaurant business. It is in the trademark licensing business. It manufac tures veritably nothing of significance to the system distributed and sold to franchisees. The fact that the whole enterprise is founded on trademark licensing is ipso facto evidence of the economic power and desirability of the marks. Dairy Queen full acknowledges the desirability

and power inherent in its name, marks and image and it diligently seeks to maintain firm legal control over all of its marks, names, styles and images. It has registered them in the U.S. patent office and in the 50 states, and presumably abroad. Exhibit M-1, page 30. Still, by the year 1982,controlling nearly one billion dollars in sales from Dairy Queen stores, it employed but 312 people, Exhibit M-3, page 14 and M-3, page 9, ranking 11th on the list of the 400 largest food service and lodging organizations in the U.S., ibid., ranking first on the list of "Limited Menu Ice Cream, Doughnut & Snack" restaurant chains, Exhibit M-4, page 180, 40th on the list of the top 50 international foodservice organizations, Exhibit M-4,page 238 and 3rd on the list of the top 10 "franchisors ranked by units on line," ExhibitM-4, page 220.

5. Dairy Queen itself brags of the influence of its trade name. See Exhibit M-8, page 24,

in order to increase the worth and power and strength of its image. It describes its name as "a household word in millions of homes across the United States for years." Ibid. It describes itself as "No. 1 nationally." Exhibit M-8,page 25 and perpetuates its strength by requiring all franchisees to purchase its distinctive signage. Exhibit M-9, page 31.

6. Internal company manuals stress the strength of its symbology as "our most valuable asset." Exhibit M-10,page 41.

7. (a) patent and (b) copyright monopoly powers have long been held to have presumptively sufficient economic strength to impose a tie-in. Dairy Queen has asserted its patent rights to its signage, Exhibit M-14, as well as copyrighting almost every paper or plastic item sold in the stores, including cups, lids, napkins, labels on cans and jars and guest checks. It asserts its copyrights on anything that will bear its stamp. Exhibit M-15,

M-16, and M-17, and has even arranged to emboss its logo on edible cones to enhance its "logo-power." Exhibit M-18. Upon information and belief Dairy Queen is the largest user of edible cones in the world as well as the largest seller of hot dogs of any restaurant chain. Trademarks have not uniformly been held to have presumptively enough economic power to constitute a tying product , although many courts have so held, but all courts have agreed that trademarks may have sufficient desirability to impose a tie. Cases have held a sign alone can be a tying product in so-called "rent-a-name" type franchi arrangements. Dairy Queen differs little from the "rent-a-name"type enterprise, it is just invested with more power and leverage and coats its activities with a veneer of bureaucracy often reminiscent of a military organization or a government agency. Sometimes, in its bulletins one thinks one is reading the internal correspondence of a

religous order, so moralistic do they wax about their beloved "System." Finally, Dairy Queen has augmented and strengthened further the desirability of their package of intellectual rights and marks by contracting to license the copyrights of cartoonist Hank Ketchum and his Dennis the Menace figures to imprint on a large array of cartons and paper products and promotional material. This additional bundle of rights makes out a nearly air-tight case for power and leverage concerning the tying product alleged in the complaint.

Two Product Rule

8. The tying and tied products must be separate, not one product. In this case the Intellectual Properties packaged are wholly separate and distinct from the underlying tied commodities. Neither advertising services nor any other tied item has any claim to identification with the franchise rights. Proof of this distinctness is found in the fact that all the commodities

sold through the Dairy Queen stores are sold outside the Dairy Queen stores under other names and labels. Dairy Queen from time to time adds and drops items from the required menu, but the tradename and marks go on. It if manufactured, itself the ice-milk sold to all Dairy Queen franchisees, it might have a claim that its Dairy Queen (only the Dairy Queen mark) is so closely and intimately identifed to the ice-mlk mix that it is one product, but it does not. It manufactures an insignificant amount of mix. It butchers now cows or chickens, it packs no meat, it harvests no trees or manufactures no paper products,it picks no nuts nor does it pack the same. It mixes no syrups for topping. It acts as nothing but a food broker and a power broker with respect to the markets it controls.

9. Tied Advertising. Since advertising contributions have in fact been required of some franchisees and in some Dairy Queen

contracts and not in others it cannot possibly be claimed that it is one property with the Dairy Queen franchise. See Exhibit I-11, page 35, ¶1 and Exhibit M-1, page 29 indicating there were in 1972 355 franchised stores paying no advertising fees and another 740 stores which "agreed to pay advertising fees" (presumably voluntarily). See also defendants answer to Interrogatory No. 15 of plaintiffs' first set of written interrogatories in O'Leary v. Dairy Queen, 78 CV 103, dated January 14, 1980, last line thereof.

10. Other tied products. If even advertising is a separate product it follows naturally that all other physical commodities are separate products for the license and marks.

Coercion

11. Dairy Queen itself and aided by its Dairy Queen "System" suppliers coerce the franchisees to buy Dairy Queen products from Dairy Queen and through the Dairy Queen System, and suppliers refuse to deal with the franchisees with respect to Dairy Queen brand

goods except through the system. At the surface level the coercion is in the form franchise contracts. See the numerous provisions in the agreements set out in Exhibit "J." Beneath this surface level the coercion outside the agreements is hard and systematic. See Exhibit "T." Exhibit T-1 and T-2 are extracts from the Store Operations Manual showing how the franchisees are specifically directed to use "D.Q." brand ingredients and "Dairy Queen" label merchandise and "brazier" label products in food preparation. The * and footnote at page 1 of T-1 is a legal self serving statement that is ignored and is irrelevant because all "Dairy Queen : and "brazier" label products have to be bought through Dairy Queen as the one source for them and because Dairy Queen arranges its distribution system so that there are few alternate sources of any possible substitute reasonably and economically available.

12. When Dairy Queen introduces a new product or line to the stores it takes the opportunity to tie in a variety of new "required" paraphernalia and equipment. See the example of its "Queens Choice" hard ice cream at T-3 requiring new "Queen's Choice" equipment, new "Menu Board" , a "Dipping Cabinet" Only one dipping cabinet **is suitable** and I am sure it must be purchased from Dairy Queen's equipment division or that Dairy Queen requires some concession for granting its approval.

13. For the frozen cakes program a franchisee must purchase a "Kopykake" projector Model K-1000, no other, and a "Kopyrite" projector **Model** K-1 and a "Kelvinator Model VHC-26 or Kelvinator Model VHC-48 or Nor-Lake **Model** F25XL **Flash** Hardening Freezer and a Chest type Hardening/storage freezer model Kelvinator Model 8 DF/Star Spot Merchandiser. The store must also acquire a " single door upright display freezer: and recommends a "Kelvinator Model VGL-26, with slanted shelving."

14. To sell the new "DQ Chipper Sandwich/ "DQ" Chocolate Chip Cookey Sandwich the operator must buy (from Dairy Queen) and sell "Dairy Queen" approved chocolate chip cookies and real chocolate chips " packaged in a Dairy Queen imprinted "DQ Chipper Sandwich" novelty bag, only available for purchase through Dairy Queen. No other bag is acceptable and no other product acceptable because to do so would allow outside firms to compete for Dairy Queen's captive business. Your deponent is informed and believes that the same cookies are available without the Dairy Queen bag or brand stamp even from some of the defendants but that they do not attempt to sell such to Dairy Queen franchisees because they are not "authorized." Yet some of the defendants or some suppliers manufacture the item under the Dairy Queen label.

15. After having coerced franchisee Powers to stop selling breakfasts in his store to

his damage in the 1970's, see Exhibit I-3, page 23 and Exhibit I7, the Dairy Queen management comes out with its own breakfast program in 1983, see Exhibit T-8.

The Powers business has in the meantime failed. Indeed all of the deposition extracts in Exhibit "I" show a systematic unreasonable coercive effort on the part of Dairy Queen, as well as the affidavits set out as Enclosure "O" to this affidavit.

16. To sell "brazier" nachos in 1983 the franchisee must buy two new pieces of equipment, Exhibit T-9 and Dairy Queen approves ingredients four out of seven of which are available only from itself.

17. The store menu itself is always rigidly enforced by Dairy Queen; can be changed at will by it, and frequently is, but cannot be added to by the store operator. See Exhibit T-10. A cumbersome "deviation request" must be employed if the operator seeks to vary the menu, which discourages initiative.

18. If a store operator desires to have video games in his store in (order to) increase revenue, Dairy Queen controls that. Exhibit T-15.

19. Bacon, having been prohibited from sale in the 1970's becomes "kosher" in the 1980's once Dairy Queen management at the top deem it acceptable. See Exhibit T-16.

20. Hard ice cream, illegal to sell in the past, becomes o.k. in the 1980's once Dairy Queen has its own brand and can restrain and control the sale of hard ice cream. See the Fennessy affidavit, Eshibit O.

21. Dairy Queen hamburgers in the past were once mandated to be soy-extended which prohibited the franchisees from buying or shopping locally. Arbitrarily, later Dairy Queen required only all beef burgers to be sold, and "seasoned", still controlling the product by means of their alleged "secret formula" concerning the meat. Now they have taken out the seasoning so all the product is is ground beef, but all Dairy

Queen franchisees must buy Dairy Queen labelled frozen ground beef, and only through authorized Dairy Queen warehouses. Only one is usually available to the franchisees in any area. Franchisees in Ogdensburg and Potsdam cannot shop for ground beef in Ogdensburg, or Potsdam or Watertown or even Syracuse, they must buy from Worcester Quallity Foods some 500 miles distant. Who absorbs the cost for this shipment? What economic justification is there for such a trade restraint? The answer is -none.

22. To participate in the Dairy Queen "ICAN" program the franchisee must have approved signage, approved menu boards, approved menu, approved products and packaging, and make a sales promotion commitment. See Exhibit T-40. When Dairy Queen decides the franchisee must purchase a new sign at great cost, it so orders: See System Bulletin No. 130 at Exhibit T-40. The new sign is available at Dairy Queen Equipment Division.

Non-acquiesence or non-compliance with Dairy Queen's orders is punished by termination. See Exhibit T-46 and suppliers of Dairy Queen products cooperate by cutting off the offending franchisee's source of supply. He is ordered to take his sign down. See the Fennessy affidavit at Exhibit "C", See also Exhibit T-58, Exhibit T-48, and witness the Kenyon, O'Leary, Gerwitz and Powers terminations of record and the threatened termination of plaintiff Guthrie and plaintiff Fennessy.

23. Regular store inspections are conducted to enforce compliance with Dairy Queen's rules regarding the sale of Dairy Queen approved foods and paper goods. See Exhibit "O."

24. Having recently reacquired the territory rights for Texas, the Dairy Queen management has set about imposing rigid controls there, which did not exist prior to their takeover. Your deponent is informed and believes that there were over one hundred mix suppliers available to franchisees in Texas before the

takeover. Dairy Queen has announced its intention to eliminate this problem. There are somewhat more than 100 mix suppliers available to all franchisees ouside of Texas. See Exhibit T-20. The uniformity Dairy Queen seeks is not the uniformity for purposes of uniformity but uniformity for purposes of economic control. One hundred mix suppliers cannot be controlled as well as one or two. If the stores do not sell a "uniform" hamburger, then Dairy Queen cannot sell them all its uniform hamburger and the result would be-free competition.

25. That Dairy Queen suppliers work hand in glove can be seen at Exhibit T-28 and T-29. A default to a Dairy Queen system supplier is treated by Dairy Queen as a default under the franchise agreement. Therefore late payment or non-payment to a Dairy Queen supplier could result in the forfeiture of the franchise.

26. Dairy Queen manufacturers and meat

packers or mix suppliers are not immune to being terminate either, and Dairy Queen restrains trade further by dictating to such suppliers the source for the ingrediants they may use in the preparation of the Dairy Queen label product. Thhis source is in turn required to sell to Dairy Queen for re-sale to the authorized manufacturer, which results in a two-tiered restraint arrangement in some cases. See Exhibit C-2, where Dairy Queen complains to Crowley Foods that it is not purchasing "Dairy Queen" approved stabilizer from the Dairy Queen approved source on the wholesale level. So Dairy Queen conducts tying on two levels of distribution-(1) on the sales to its authorized suppliers and (2) on sales from the authorized suppliers to the authorized warehouse. On both levels the purchaser must purchase needed products through Dairy Queen on Dairy Queen invoices and must not deal directly with the approved source.

27. Once a franchisee falls behind in pay-

ments and becomes indebted to Dairy Queen Dairy Queen wields an additional weapon of enforcement. See Exhibit T-79, T-80 & T-74, and when Dairy (Queen) wants to terminate such a franchisee the franchisee is only too eager to sign any waiver or general release for partial or total forgiveness of the indebtedness. This suppresses otherwise meritorious lawsuits and keeps Dairy Queen out of court scrutiny. Its now mandatory arbitration clause provision in the current form contract also is designed to keep franchisees from bringing their greivances to the attention of the courts.

28. Other acts of coercion interplay with some of the other headings hereinafter and will be raised there for further illustration and argument.

Allocation of Markets and Customers

29. Exhibit "H" documents instances of how Dairy Queen combines with its suppliers to horizontally allocate and divide markets and

customers. Exhibit H-1 shows a map of the Crowley Foods distribution network in the State. On Exhibit H-1 is indicated "Arkport" from which plant Crowley had for some time made Dairy Queen ice-milk mix and distributed the same. H-3 includes a territorial map showing Beck Creamery's distribution area. (Beck Creamery is another name for defendant Upstate Milk Coop., Inc.) A comparison of the two maps will reveal that Arkport is deep in Beck's territory.

30. Normally this would allow Dairy Queen franchisees in Beck's territory to be able to buy mix from Arkport and Crowley since both were for years authorized mix suppliers. However, Crowley never sold in Beck's territory because Dairy Queen, Beck and Crowley all participated in an arrangement whereby Beck had exclusive sales rights in its area and Crowley was given another area.

31. Evidence in the prior cases, in Exhibit "I" shows that Crowley would nto even sell

mix to Syracuse Franchisees, because Beck had been given that territory. So both firms enjoyed for years monopoly power over the captive Dairy Queen stores in their respective territories without fear of competition for customers. Dairy Queen fully understood and participated in the arrangement. Crowley for years serviced the stores in the Northern District.

32. Your deponent believes that the system with respect to Beck's and Crowleys is and has been widespread throughout the Dairy Queen system in the United States, no only with respect to mix but also with respect to the distribution of meat and all other supplies through "authorized" warehouses, also allocated their set of customers or their region of distribution in which they are and would be free from competition.

33. See the affidavit of Gwen Putman herewith in Exhibit "O" describing attempting to buy Dairy Queen brand products directly from Carter Paper Company and being told they did

not want her as a customer, directing her back to Worcester Quality Foods, the one warehouse Dairy Queen and the "system" want her to deal with. This, despite the fact as attested at Exhibit H-2, that Mrs. Guthrie had been told in writing that she might buy products from Carter Paper Company. Exhibit H-4 shows how the arrangement is conrolled at the store level. The form "Store Monthly Report", lower left-had corner monitors the sources from which the store operator buys all products. Note: One mix supplier, Beck's is authorized to Mr. Gerwitz, not two, even though Crowley had mix in Syracuse and could sell to him, and two warehouses are authorized in Syracuse, at this time. One Mr. Misty supplier and one general warehouse supplier is authorized. The warehouse carries all the paper produ;cts, cups and lids.

34. A reading of Exhibit H-5 makes clear Dairy Queen's role and the entire method of doing business. See also H-6. Exhibit H-7 shows a customer list of Beck's which takes

in the Syracuse area. Exhibit H-9 shows Crowley Foods' customer list. It is evident that Crowley could service the Syracuse stores because it goes all the way to the Canadian border in the North and all over the state, but does not touch the Syracuse stores because these are Beck's customers and Crowley was not "authorize in the Syracuse area." See the Depositions at Exhibit "I."

35. Marketing areas for advertising purposes are geographically divided up by so called "ADI" areas. See Exhibit H-15. Authorized warehouses and distributors are listed at Exhibit H-14, again there are only one or two such warehouse sources for all franchisees in a given area. As the Putman affidavits show, warehouses out of the franchisee's area would not sell to it. Instance the case of Carter Paper.

36. Exhibit "H-19" shows how Dairy Queen authorizes the opening and closing of areas of competition. H-19 ever refers to a map!

37. Exhibit "H-23" shows the authorization of "the" mix supplier for all Long Island stores. Only one is authorized. All competition is thus eliminated.

38. Further illustrations are not necessary at this early stage of the proceedings, but counsel is sure the pattern in the evidence will be consistent.

39. Exhibit D-1 shows a map indicating the shaded area to be Beck's territory and the clear area of the State to be Crowley's territory. With Crowley plants at both Binghamton and Arkport in Beck's territory. With the exclusion of Syracuse, and even having a plant in Syrause, the arrangement is evident. The community names on the map are Dairy Queen store locations.

Fiduciary and Confidential Relationship

40. Dairy Queen fosters the "family" image. It inculcates thefeeling and the spirit among its franchisees that "we are one big family" working together.

The profit motive is almost secondary. See Exhibit F-17, an article from the World of DQ magazine of Nov/Dec 1977 entitled "You, Us and Them". See Exhibit F-18, where the president of Dairy Queen announces " 'You' and 'we' are allies and not adversaries." World of DQ Nov/Dec 1977. Dairy Queen operates as the franchisees' insurance agent, Exhibit "F-1" and secretly profits through commission rebates I have been informed and believe.

41. Exhibit "F-6" stresses the "family" nature of the relationship.

42. Incredibly, Dairy Queen sold Mrs. Guthrie insurance on the Eskimo store premises complained of by her in Gouverneur, N.Y. and then prevented her from operating her store. This appears to be an unreasonable restraint of trade. See Exhibit "F-8."

43. Dairy Queen has in many instances required or requested and gotten approval to automatically draft their bank accounts. See Exhibit F-27.

44. Certainly, with respect to the advertising funds it administers it is a trustee for the benefit of the franchisees. A trustee relationship is certainly one of special confidence and of a fiduciary nature.

45. Dairy Queen confides trade secrets to its franchisees and in turn has access to the most intimate of the franchisees' business records, including the right of full blown audit, which occurred in the case of Fennessy here.

46. Sometimes it provides legal advice to the franchisees. See Exhibit F-18, an article entitled "The Law" "an update on legislation." But more importantly and in connection with the Poole case, it solicited and (and in the case of Mrs. Powers, more than solicited, Exhibit "I-5, page 46) the franchisees to "opt-out" of the class action at the inception. See Exhibit F-21 and then, after it had paid-off the class action lawyers, See Exhibit F-20, and the case was dropped without so much as one dollar per

store in damages awarded to the class, then, at F-21, page 2,Harris Cooper personally advised them to stay in the class so as to have their rights cut-off and provide Dairy Queen with what they thereafter asserted to be judicially declared rights under the settlement and the defense of release on the class action plaintiffs. Dairy Queen made great defensive use of the Poole case settlement in opposing the plaintiffs O'Leary, Powers and Gerwitz-witness their answers in those proceedings.

Dairy Queen Supply

47. Contrary to what Dairy Queen asserts in its present motion, Dairy Queen Supply both exists and exists for business purposes in this District and State. The fact that it may be International Dairy Queen, Inc. operating under an assumed name, and probably illegally in New York, does not make the complaint dismissible.

Advertising

48. Exhibit "A" shows how advertising dollars are adminstered and spent by Dairy Queen and how it charges off management fees it sets by itself against the fund. The funds must be regarded as trust funds. In addition, Exhibit "A" shows how the defendant "Councils" are employed to give the impression that the franchisees are somehow legally aurhorizing the expenditure of these funds. They are not.

Distribution

49. Exhibit "D" shows that IDQ Distributors does exist and operate in this State and in the Northern District under that assumed name and whether it is in fact International Dairy Queen, Inc. so operating, does not make this acdtion dismissible as to them.

50. Exhibit "D-8" is an extract from the Dairy Queen headquarters phone book showing the organization of "IDQ Distributors." Note with interest the office has an account supervisor and three "Rebilling Clerks."

Not many businesses have what are called "Rebilling Clerks." What they rebill and how invoices are handled is explained with reference to the Putman affidavits at Exhibit "O". We believe it to be nothing more than a complicated exchange of invoices to cover up a wide-spread kickback scheme. Goods that Dairy Queen requires its franchisees to buy, it arranges to require them to buy from it and prevents them from buying from the original sources of the supplies. Goods needed by the warehouses are shipped directly from the manufacturer to the warehouse but the bill is mailed to Dairy Queen, who pays the manufacturer and "rebills" the warehouse. Thus Dairy Queen itself is coercively selling to the franchisees. See Exhibit D-21. At Exhibits D-22 and subsequent exhibits, are form invoices used by the "authorized warehouse". Although Dairy Queen makes a great show out of authorizing alternate products to the franchisees verb-all and formally, the stocks of the ware-

houses and the goods offered for sale to the franchisees in the actual distribution system are more than predominantly Dairy Queen brand. See Exhibit D-27, setting forth the present authorized warehouses price list. The list is nearly wholly devoted to available "DQ" brand authorized merchandise and "brazier" merchandise, but all but devoid of any competing "authorized" supplies.

51. The Court is asked to recall that, as appears from the evidence, everything bearing the "DQ" and "Brazier" label is sold exclusively through Dairy Queen itself, before passing through the warehouse.

The Queen's Jesters

52. Few commercial enterprises find the need for organizing "spirit" organizations or cheerleaders. Common sense dictates that anything a business corporation organizes is for business purposes and for profit. To do otherwise would in fact be ultra vires. The Queen's Jesters are no laughing matter. It permits them a vehicle by which they can

come together and collectively meet for purposes of developing harmony and cooperation within the "System". See Exhibit Q-4. This would be fine except that the suppliers are and are supposed to be most instances competitors, and not cooperatin. They should be fighting for markets, not sharing them. Not having been present at the meetings referred to at Exhibit Q-4 one can only imagine what was discussed and planned, but your deponent issure they did business. See Exhibit Q-7 showing how Dairy Queen fosters the feeling and policy that the suppliers are "partners in profit." They may in fact be so but they may not be lawfully so.

53. The Queen's Jesters is supposed to a suppliers organizatioi. It may not even be that. See Exhibit Q-21. In addition, the Queen's Jesters somehow is involved in the publication of the price lists available to authorized warehouses. At his point any court would ask, shouldn't some evidence be taken concerning groups of "authorized"

suppliers banding together in a system such as Dairy Queen's in a novel and unexplained format and having something to do with the published price lists in the system.

(balance of paragraph omitted.)

(balance of affidavit, ¶¶ 54 through 70 omitted.)

/s/.....
Thomas A. King

Suscribed and Sworn to Before
Me This 7th Day of March, 1984

/s/.....
Notary Public

INDEX TO RECORD ON APPEAL (PARTIAL)

The affidavit of Thomas A. King is marked Enclosure "K". Additional enclosures thereto are as follows:

Enclosure & Exhibit "A" (Advertising)

Enclosure & Exhibits "B","C" & "G" (Documents from the files of Beck's Creamery, Crowley Foods and Granite State Packing Company)

Enclosure & Exhibit "D" (Distribution)

Enclosure & Exhibit "E" (Equipment)

Enclosure & Exhibit "F" (Fiduciary/ Confidential Relationship)

Enclosure & Exhibit "H" (Horizontal Allocation of Markets and Customers)

Enclosure & Exhibit "I" (Depositions)

Enclosure & Exhibit "J" (Contracts & Agreements)

Enclosure & Exhibit "M" (Market Power & Leverage)

Enclosure & Exhibit "N" (National Dealer Marketing Council/ Territory Operators Advisory Council)

Enclosure & Exhibit "O" (Affidavits)

Enclosure & Exhibit "P" (Prices)

Enclosure & Exhibit"Q" (The Queen's Jesters)

Enclosure & Exhibit "S" (Dairy Queen Supply)

Enclosure & Exhibit "T" (Terminations,
Coercion & Enforcement)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.

Plaintiffs,

Index No. 83 CV1720 (Judge Munson)

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Defendants

AFFIDAVIT

(Enclosure "O")

STATE OF NEW YORK)
(Exhibits to Affidavit and certain paragraphs omitted)
COUNTY OF ST. LAWRENCE) ss.:

Gwendolyn Putman and John Putman of Canton, New York, first having been duly sworn depose and say:

1. We are respectively the daughter and son-in-law of Mrs. Audrey E. Guthrie, the plaintiff herein and have been for a number of years the managers of the Canton Dairy Queen store on Gouverneur Street in Canton, New York. We are fully familiar with (the) operation of the Canton Dairy Queen and are familiar with this case.

2. On January 17th and 18th we attended a food show held at the Marriott Hotel in Worcester, Massachusetts. The show was sponsored by Worcester Quality Foods and American Dairy Queen. There were approximately 20 booths set up by different approved suppliers of Dairy Queen products. Each booth had a sample or promotional display of their product, and many booths were displaying new products. Nearly every booth was offering a "show price discount." All exhibitors stated that Worcester Quality Foods was actually giving the discount on the product.

¶¶ 3,4 & 5 omitted.

6. At the Fort Howard Paper booth we spoke (Maryland Cup Corporation) with Robert Welsh, the national accounts manager. We asked about buying napkins with the Dairy Queen logo on them directly from the Fort Howard company. He explained that he could not do this as the Fort Howard Company has a contract with

(Ellipses represent other redacted matter)

International Dairy Queen which would prohibit such direct sales. He said the only way we could buy the imprinted napkins was through Worcester Quality Foods. He also said that he could sell non-Dairy Queen napkins directly to us. . . . .

7. We spoke to Louis Tonelli at the Holly Farms Chicken booth. . . .We asked if we could buy product directly from Holly Farms and he replied that we couldn't buy directly from the company because we couldn't meet the company's minimum order (he never said what that was) and because all orders must go through a distribution network.

* * * *

8. We spoke with Douglas Thibault, who is broker for FDL Foods, Inc. a representative of Jordan Meat Compnay, Dubuque Packing Company and DuPako. . . .He could not sell products directly to us. . . .

9. Thereafter we spoke with Michael Taft,

The regional sales manager for Park 100 Foods, Inc. We asked if we could buy a comparable chili dog sauce without the Dairy Queen label on it. He explained that Park 100 had an identical product tothe Dairy Queen label product that he could sell to us at a cheaper price. We questioned this further and Mike explained that he could not sell the Dairy Queen labeled product directly to us as the billing went through International Dairy Queen.. . . .

10. At the Icelandic brand frozen food booth ,we spoke with Joe Devine, sales sales manager for the brokerage firm of Boef & Assocates, reprsenting Coldwater Seafood. He spoke at great length of the controls Internationial Dairy Queen has over the brokerage firm and the negative impact of these controls both to Dairy Queen franchisees and to his brokerage firm. Additonally, he told us that International Dairy Queen would not allow Dairy Queen label fish to be sold directly to

individual Dairy Queens-that it must go through the authorized warehouses. He said he shipped fish to Worcester Quality Foods but had to bill International Dairy Queen. He said he could sell us the exact same fish fillet but without the Dairy Queen label. Also, Joe spoke of several new products thathe wanted to bring samples of (to) the food show, but that International Dairy Queen would not allow him to do so. He told of several restaurants using these new produts (for example, crabmeat salad, seafood platters, scallops, etc.) and finding them successful profit items and store traffic volume buuilders. . . . ¶11 omitted.

12. Until we investigated the practices of International Dairy Queen described herein, and described in the affidavit of Gwen Putman accompanying this affidavit we were never aware of the behind the scenes profit making that Dairy Queen has been engaged in at our

The secret arrangements revealed by our investigations can only be described as a secret kick-back scheme or arrangement. I know from conversations with our mother and father that neither was ever aware of what Dairy Queen was doing behing their backs. Also, I know that many other Dairy Queen operators must be in the dark concerning thesse arrangements because we have discussed supply and distribution problems, problems of alternate supplies and problems concern ing the limitation of our product lines and noone ever revealed the real reason why we are restricted to but one authorized warehouse; the real reason being that to allow its franchisees to buy directly from the real suppliers would deprive secret profit arrangements with suppliers. We can also attest thatwe neve knew that when we purchased goods from Worcester Quality Foods or any other authorized distributor that we were really purchasing from International

We can further attest, based on numerous conversations with our parents that they never knew these facts. We can also attest that no other Dairy Queen operator we know or have known has known these facts or if one did it was never revealed or mentioned to the other operators. Why should we be compelled to purchase goods needed in our Dairy Queen business required of us by Dairy Queen by contract only from or through Dairy Queen itself? It is clear from our investigation that numerous of the suppliers have identical merchandise for sale, ofter at cheaper prices, as is prsently sold to us under a Dairy Queen label. Why should we pay additonal sums of money to Dairy Queen for the useless right to have the goods packed in a Dairy Queen labeled box, can, carton or container? We have already licensed from Dairy Queen the right to use the Dairy Queen name and symbols in our franchise agreement and have paid dearly for that right by paying them 4% of gross sales

(7% together with the advertising contribution) for many years and presently on acontinuing monthly basis. It is clear that Dairy Queen not only profits by 4% on all gross sales made through all Dairy Queen stores having contracts like ours, but also secretly profits at their franchisees' expense in a further amount-some higher and further percentage on all sales of merchandise bearing the Dairy Queen or brazier label sold through the Dairy Queen system. What one calls this further hidden, secret and covert profit is not for use to say, not being lawyers, but we object to it.

¶13 omitted.

/s/
Gwendolyn Putman

Subscribed and Sworn

/s/
John Putman

To Before Me This 11th

Day of February 1984

/s/.....

Notary Public

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.,

Plaintiffs,

-against-

INTERNATIONAL DAIRY QUEEN INC., ET AL.,

Defendants.

Index No 83CV 1720
(Judge Munson)

AFFIDAVIT

(Enclosure "O")

STATE OF NEW YORK)
: ss.:
COUNTY OF ST. LAWRENCE)

I, Gwendolyn Putman of Canton, New York, first having been duly sworn depose and say: (Ellipses indicate redacted matter.)

1. I am the daugher of the plaintiff Audrey Guthrie and together with my husbad John have been managers at the Canton Dairy Queen store since about 1975. I am fully familiar with the operation of the business and this pending case. In

investigation defendants activities, I made a series of phone calls to our suppliers, in each instance identifying myself as either the owner or operator of a Dairy Queen store in either Canton, New York or Northeastern New York.

2. Ward-Johnston, Inc. Robert A. Johnson Company is a supplier of approved dessert toppings needed in the Dairy Queen business, such as Chocolate Hot Fudge topping, Butterscotch topping, Caramel topping, Marshmallow topping, Chocolate syrup, Chocolate Cone Coating and other products. My attorney h as advise me that Ward-Johnston, Inc. is a wholly owned subsidiary of defendant Terson Company, Inc.

On November 1, 1983. . . I called the Robert A. Johnston Company at Milwaukee, Wisonsin. . . . . I spoke with one Maureen Smith who said they they do not ship to individual Dairy Queen stores. . . . Chuck McGee, the regional manager. . .explained to me that

his contract with International Dairy Queen, Inc. stated that he must sell exclusively to International Dairy Queen (or IDQ) warehouses. He explained that International Dairy Queen requires that he, Chuck working together with a Bill Smith at Dairy Queen headquarters place the orders for the authorized warehouses and that then Robert A. Johnston ships to those warehouses while the bills and invoices are sent to Dairy Queen in Minneapolis for payment by Dairy Queen. He said that Dairy Queen billed the authorizd warehouses. He said he was not permitted to ship to an authorized warehouse without IDQ's telling him to.

3. Lind Plastic Products, Inc. On November 2, 1983. . . I called Lind Plastics at . . .Chicago Illinois. . . I spoke to Ted Lind the owner, who told me that his contract with Dairy Queen precludes him from selling to anyone but the franchisor.

3. Owens-Illinois, Inc. . . . .

On November 3, 1983. . . I called Lily-Tulip in Toledo. . . . I spoke to Charles Burkelman of their purchasing department. He said that he sold the Dairy Queen products only through the authorized warehouse system unless for orders of 150 or 200 cases minimum and then only rarely . . .

¶¶ 4,5 &6 omitted.

7. Beck Vanilla Products Company.

Beck Vanilla Products is an authorized supplier of Banana, Coffee and Egg Nog Shake and Soda Bases, Liquid Malt, Mr. Misty brand concentrates and other products required in the Dairy Queen business. On December 22, 1983. . .I called Beck's at East St. Louis, Illinois . . . and spoke to one Sylva Paulsonburger, office manager. She stated that we could not purchase Mr. Misty bases and flavors from Beck because

IDQ(Dairy Queen) won't let them sell to individual stores as the billing has to go through IDQ. . . . .

8. Plastics, Inc. Plastics, Inc. is an authorized supplier of Dairy Queen label thinwall parfait glasses to the Dairy Queen system.

On December 22, 1983. . . I called Plastics, Inc. in St. Paul, Minnesota. . . on Pete Gildarque. . said that I'd have to get a purchase order from IDQ-that is International Dairy Queen, and pay IDQ in order to buy his product. . . . .

9. George & Thomas Cone Company. George & Thomas supplies edible cones to the Dairy Queen system. It is an authorized supplier of such cones in the form of sleeves, dispensers and in bulk.

On December 16, 1983. . . I called George & Thomas Cone and spoke with one Wendy Mahalton. . .I asked. . .(Dave James) if he could sell cones directly to us.

He said his contract with IDQ (Dairy Queen) was set up so that he sold to IDQ and then IDQ sold to Worcester Quality Foods. . . .

10. Commercial Testing Laboratory, Inc. Commercial Testing Laboratory is an authorized supplier of syrup base and malted milk powder as well as malted milk powder dispensers to the Dairy Queen system under the Dairy Queen label, products needed in the operation of the Dairy Queen store. On December 16, 1983 . . . I called Commercial Testing Laboratory of Colfx Wisconsin. . . and spoke to Joanne Paulson, secretary, and she put me through to Mike Bean, president of the company. The only way that he can sell the authorized product ,he said, is through an approved warehouse. He explained that he sold to IDQ (that is, Dairy Queen) and that IDQ bills the authorized warehouse. IDQ will not, he said, let him sell directly to an individual store.

He does, he said, have a private label (Commercial Testing Laboratory) that he would sell to us. I asked him about the private label-if it was the **exact product** except with a different label. He explained that the private label was identical to the Dairy Queen label product except for the label.

. . . .

11. Sweetheart Plastics, Inc. . . . .

Our attorney has advised me that Sweetheart Plastics is a wholly owned subsidiary of defendant Maryland Cup Corporation.

On December 19, 1983. . . I called Sweetheart Plastics, of Wilmington Mass. . . and spoke to Pauline **Baker** superviser of customer services. Pauline explained that they can only sell to authorized distributors or individual Dairy Queens that have been authorized through Dairy Queen in Minneapolis. She stated that all orders must go through IDQ headquarters.

¶¶ 12 through 18 omitted.

19. Carter Paper Company. Carter Paper is an authorized warehouse for Dairy Queen paper and dry goods and supplies needed in the Dairy Queen operation.

On December 20, 1983 at 10:50 a.m. I called Carter Paper at (413) 785-1961 in West Sprinfield, Massachusetts and talked to Mr. Clay McLaughlin, sales and service department. He stated that there was no new price list, but he would send one when they are finished. They said that they would accept us as a new customer with a minimum order of 500 pounds. If we are too far up in northeastern New York it would take about 3 days to deliver, as the products would come common carrier. However a few days later I received the "speedy reply message" dated December 22, 1983, appended to this affidavit from the Carter Paper Company.

¶¶ 20 through 28 omitted.

/s/
Gwendolyn Putman

Suscribed and Sworn to
Before Me This 18th Day of February 1984
/s/_____ Notary Public

from Dairy Queen/Brazier/Ms Putman

P.O. Box 398, Canton, New York

CARTER PAPER CO.

136 Wayside Avenue

West Springfield, Mass 01039

Tel (413) 785-1961

Message date 12-22-83 Reply

Dear Ms. Putman:

Thank you for your inquiry regarding Dairy Queen purchases from us. I'm sorry to advise you that we are unable to provide the service you require.

Worcester Quality Food, Worcester,Mass. may be an alternate source for you to inquire about.

Very truly yours,

/s/_____

Clayton McLaughlin

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.,

Index No. 83CV1720
(Judge Munson)

Plaintiffs,

-against-

AFFIDAVIT

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

(Enclosure "O")

Defendants.

STATE OF NEW YORK)
: ss.:
COUNTY OF ST. LAWRENCE)

(Exhibits to Affidavit omitted. ¶ 5 of Affidavit omitted.)

Barbara Snyder, first having been duly sworn, deposes and says;

1. I reside and work in Ogdensburg, N.Y. and have been the manager of the Ogdensburn Dairy Queen store for a number of years, being presently employed by Mr. Paul Fennessy.

2. I am fully familiar with the operation of

the Ogdensburg Dairy Queen and work in the store on a day to day basis.

3. I am generally familiar with the present law suit and have been asked to read the affidavit of Gwendolyn Putman of the Canton Dairy Queen store describing in 28 paragraphs the series of phone calls she made to the Dairy Queen suppliers. I have also read the joint affidavit of Gwen Putman and John Putman concerning their visit to the Dairy Queen food show in Worcester in January of 1984.

4. Although I have had oral converations and received information orally concerning some of the information contained in those affidavits, having read them for the first time I can say if the information contained therein concerning secret contracts and Dairy Queen's system of restridting the suppliers from sselling directly to the Dairy Queen stores is true, and if the basic arrangements described in those affidavits are true, then I have been kept ignorant of that fact through all the years

I have been working in Dairy Queen and for all the time I have been a manager of the Dairy Queen store in Ogdensburg.

/s/_____
Barbara Snyder

Subscribed and Sworn
to Before Me This 18the
day of February, 1984

/s/_____
Notary Public

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.,

Plaintiffs,

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Defenants.

Index No. 83CV1720
(Judge Munson)

AFFIDAVIT

(Enclosure "O")

STATE OF NEW YORK)
:
COUNTY OF ONONDAGA) ss.:

Mrs. Margaret Briant, first having been duly sworn, deposes and says:

1. I am the widow of the late Donald Powers, who, together with myself, operated a Dairy queen/brazier store in Liverpool, New York from in or about 1968 until in or about 1976. Our franchise was terminated by Dairy Queen in 1976. I brought suit against Dairy Queen in October of 1978 and the case was settled in this Court in the fall of 1982. (Index NO. 78 CV 406)

2. I have been asked to read a certain affidavit of one Gwendolyn Putman of Canton, New York, dated February 18, 1984 concerning the results of a certain telephone investigation of Dairy Queen suppliers conducted by her in November and December of 1984. I understand that Mrs. Putman is the manager of the Canton Dairy Queen. I assume for purposes of this affidavit that the facts set forth in Mrs. Putman's affidavit are true.

3. I state here that both myself and my deceased husband were totally ignorant about the secret billing practices and arrangements revealed by Mrs. Putman in her affidavit. We were ignorant of such arrangements all during the period we were franchisees and I was ignorant of such arrangements even on the date my lawsuiut was settled in 1982. I was ignorant of these facts until I read the Putman affidavit a few days ago. We had suspicions that Dairy Queen was secretly profiting at our expense and we had evidence

that Crowley Foods would not sell mix to us despite the fact that it was an authorized Dairy Queen mix manufacturer, as I testified in a deposition in my case, but the facts revealed by Mrs. Putman's affidavit are totally new disclosures.

4. During the about 8 years of being a Dairy Queen franchisee I was never aware that Dairy Queen had arranged with our suppliers not to sell their products to us directly and I was never aware that Dairy Queen was requiring its suppliers to sell Dairy Queen supplies in a purely paper sale to it and then re-billing such supplies to their authorized warehouses for resale to us, apparently profiting on such paper sales and resales. I believe if such was going on it was fraudulent both to ourselves and all other franchisees.

/s/_____
Margaret Briant

Subscribed and Sworn To

Before Me Thhis 27th Day of February, 1984

/s/_____ Notary Public

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.,

Plaintiffs,

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Defendants.

Index No. 83CV1720
(Judge Munson)

AFFIDAVIT

(Enclosure "O")

(¶¶6 &7 omitted.)

STATE OF NEW YORK)
: ss.:
COUNTY OF ONONDAGA)

Richard L. Gerwitz, first having been duly sworn, deposes and says:

1. I am the former Syracuse Dairy Queen franchisee, whose store was located on Seneca Turnpike and Valley Drive in Syracuse, New York. I operated the store from about 1965 through December of 1979, or about 14 years. In the fall of 1982 my case against Dairy Queen resulting from my termination and for other reasons was settled. I have now been

asked to read a certain affidavit of one Gwendolyn Putman and another joint affidavit by Gwendolyn Putman and John Putman, concerning an investigation conducted by the Putmans, the managers of the Canton, New York Dairy Queen, or Dairy Queen's distribution practices.

2. I assume for purposes of making this affidavit the truth of the facts disclosed in the Putman affidavits dated February 18, 1984.

3. Basically, I can say that I was ignorant of the facts disclosed by the Putmans' investtigations all during the 13 or 14 years I was a Dairy Queen franchisee, as well as being ignorant of such facts all through my lawsuit against Dairy Queen, ignorant of such facts on the date the case was settled and ignorant of these facts up to the date I read the Putman affidavits.

4. I now know why Dairy Queen was so insistent upon my using only "approved" products from "approved" suppliers that had been tested by Dairy Queen and had met the "high standards"

set by them. This control over the stores included not only products for resale, but equipment used in the store. Dairy Queen was very insistent that I use only Dairy Queen "approved" equipment. Once I purchased some frying equipment for use in my Dairy Queen which were not approved by them. Their area representative became quite angry at this and I was warned not to do it again. I was not "written-up" at this time, but was warned if I should be caught doing so again that I would be "written-up" and there might be serious consequences.

5. Dairy Queen always stated that in order to present uniformity to the customers, it was necessary that stores use only "approve" products and equipment. I now realize that an extra profit for Dairy Queen was also in the picture. The only time I suspected there might be something like this going on was when I received what apparently were "kick-back" checks from Pepsicola Company based

on my purchases from them. I testified to this in depositon testimony given, I believe , in the case of Powers v. Dairy Queen. I was unaware that I had apparently been the "tip of the iceberg" concerning what Dairy Queen had been doing secretly.

/s/_____
Richard L. Gerwitz

Subscribed and Sworn To
Before Me This 27th day of February, 1984

/s/_____
NOTARY PUBLIC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.,

Plaintiffs,

Index No. 83CV1720 (Judge Munson)

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Defendants.

AFFIDAVIT

(Enclosure "C")

(Exhibits to affidavit omitted.)
(¶¶ 4 through 10 omitted.)

STATE OF FLORIDA)
: ss.:
COUNTY OF BROWARD)

Paul M. Fennessy, a plaintiff herein, first having been duly sworn, deposes and says:

1. I am a plaintiff herein and am and was the owner of the Ogdensburg Dairy Queen store from about 1971. I am familiar with the complaint herein and fully familiar with the operation of the Ogdensburg Dairy Queen store.

2. I have read the affidavit of Gwendolyn

Putman setting forth her telephone survey of Dairy Queen suppliers, consisting of 28 paragraphs herein, as well as the joint affidavit of Gwendolyn and John Putman setting forth facts learned at the Dairy Queen food show at Worcester Massachusetts in January of 1984. Although I had gained some information contained in the Gwen Putman affidavit orally from her or orally through my manager Miss Snyder or my attorney Mr. King before reading it, I can here state that during the twelve-plus years of operating as a Dairy Queen franchisee I was never aware of the facts revealed by her investigation and as set forth in that affidavit. Specifically-

a. I was never aware that the Dairy Queen brand products I have been purchasing for my store through the Dairy Queen "authorized warehouse system" and required by contract by Dairy Queen had been the subject of the secret paper transactions described by Mrs. PUtman, including the paper sale and paper re-sale to Dairy Queen of such goods to Dairy

Queen before such items are sold to me through the warehouse-presently, Worcester Quality Foods. I assume for purposes of this affidavit the truth of the facts set forth in the Putman affidavits.

b. I was at all times during my period of ownership of the Ogdensburg store operating under the belief that Dairy Queen merely authorized and approved certain products and the authorized warehouse sold and distributed those products which it bought from manufacturers and suppliers of such approved products. Dairy Queen has certainly fostered this impression and has never informed me of the contrary. I now learn,upon information and belief, that Dairy Queen has-

(1) entered into numerous secret contracts and agreements preventing its authorized suppliers from selling to me directly;

(2)required that all Dairy Queen brand approved products must be purchased from a few specific authorized sources in a given area,- in our

area the warehouse is Worcester Quality Foods, while repeatedly telling me over a long period of time, both in writing and orally that I am permitted to purchase such products from "whatever source available."

(3)I have to the date of these disclosures been ignorant of the fact that the primary suppliers ship commodities and Dairy Queen needed supplies to the authorized warehouse while sending the bills to Dairy Queen headquarters in Minneapolis, and ignorant of the fact that Dairy Queen then re-bills the authorized warehouse, here Worcester Quality, in a purely paper "re-sale" of such goods to the authorized warehouse; apparently realizing secret profits on such sales and resales to the warehouse. Any documentation of such sales ,resales and billings hs been kept secret from me and to my knowledge secret from any other Dairy Queen operator I have talked to, and I have talked to many.

(4) I have also been kept ignorant of any

"promotional discounts" Dairy Queen now seems to have been receiving from suppliers by reason of these paper wholesale purchases.

3. Dairy Queen's actions, if true, as Mrs. Putman has stated, are in my mind fraudulent in that while they publish approved product lists bearing the statement "you may purchase the approved products from any source you desire" they consciously frustrate my ability to do so by conspiring and arranging in secret by contract and agreement with the sources of such approved products so to compel such sources not to sell to me directly and compelling them legally to sell only to and through Dairy Queen and its authorized warehouses. They have thus, it seems, secretly arranged to restrict my sources of supply while telling me I was free in my source selection reaping I am sure substantial secret profits on all sales to me through the approved warehouse- in this case Worcester Quality Foods, but prior to Worcester otherauthorized warehouses.

/s/_____
Paul M. Fennessy

Subscribe and Sworn To Before Me

This 24th day of February, 1984

/s/_____

NOTARY PUBLIC

UNITED STATES DISTRICT COURT

NORTHERN DISRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.,,

Index No. 83CV1720
(Judge Munson)

Plaintiffs,

-against- AFFIDAVIT

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

(Enclosure "O")

Defendants.

(Exhibits 3 through 8 to affidavit omitted.)

(¶¶ 6 & 7 omitted.)

STATE OF FLORIDA)
: ss.:
COUNTY OF)

Audrey E. Guthrie, first having been duly sworn, deposes and says:

1. I am a plaintiff in this action and am familiar with the Complaint herein and fully familiar with the operation of the Canton Dairy Queen store.

2. Having been vactioning in Florida, I was asked to read the affidavits of my daughter

Gwendolyn Putman and the joint affidavit of Gwendolyn and John Putman dated February 18, 1984,which I have done.

3. Based on my review of these documents and based on oral conversations prior to this review by phone with my daugher and my attorney concerning the progress of my daughter's investigation, and assuming the truth of the matters contained in the affidavits referred to, I can state the following:

(a) Neither I nor my deceased husband, Wallace were ever aware of the behind the scenes activities of our suppliers described in such affidavits from June of 1968 until shortly before filing our complaint herein. (b) Neither myself nor my husband, until his death, although we had been actively engaged in the running of the Dairy Queen business all through the 16 years preceding this action, ever knew that

1-Dairy Queen had arranged with our suppliers not to sell us Dairy Queen/brazier needed

supplies directly;

2-that Dairy Queen had secretly arranged so as to require most Dairy Queen/brazier supplies to be funnelled through Dairy Queen in paper sales and resale transactions- that is a paper sale to Dairy Queen combined with a paper resale to the authorized warehouses.

4. Based on these disclosures and applying commonsense, I believe that Dairy Queen has been secretly and fraudulently profiting at our expense and to our damage from the inception of our operation to this date.

The "Eskimo" Interference

5. In April of 1979, and as an inducement to rescind our old franchise agreements with them and enter into their present form 301A franchise agreement(containing a broad arbitration clause) Dairy Queen granted us the right to operate an independent restaurant, called "Eskimo" in our area. Se Exhibit "1" annexed hereto. Thereafter, afater we had signed the present agreement they rneged on this permission. See Exhibit "2" annexed hereto.

Their actions have directly damaged us, as is alleged in the Complaint.

/s/_____
Audrey E. Guthrie

Subscribed and Sworn To
Before Me This 29th day of
February, 1984

/s/_____
NOTARY PUBLIC

IDQ

"EXHIBIT '1'"

EXECUTIVE OFFICE OF

AmericanDairy Queen Corporation

Dairy Queen Frozen Products (Canada) Limited

DairyQueen Financial, Inc.

DAIRY QUEEN/
BRAZIER

April 23, 1979

Mr. Wallace Guthrie

"Dairy Queen/Brazier"

43-45 Gouverneur Street

Canton, NY 13617

Dear Wally:

Permission is hereby granted for you to own and operate the"Eskimo" (an independent soft serve business) per the conditions of paragraph 2.8 of your 301A "Dairy Queen" Operating Agreement. If you have any questions or comments please give me a call.

Very truly yours,

AMERICAN DAIRY QUEEN CORPORATION
/s/Walt Tellegen , Vice President Operations

IDQ "EXHIBIT '2'"

EXECUTIVE OFFICE OF

American Dairy Queen Corporation

Dairy Queen Frozen Products(Canada) Limited

Dairy Queen Financial, Inc.

DAIRY QUEEN/
BRAZIER

September 12, 1980

Mrs. Audrey Guthrie

Dairy Queen Store

43-45 Gouverneur Street

Canton, NY 13617

Dear Mrs. Guthrie:

This is with further reference to my letter of August 11 concerning "The Eskimo."

I have discussed the matter with our operations people and with our outside legal counsel. All are in agreement that your involvement has a disruptive effect, as it gives you access to marketing plans, new product development, and so forth, that are for the sole benefit of American Dairy Queen Corporation's licensees.

As a result, I must insist, once more, that disassociate yourself from "The Eskimo." If you fail to do so, we will have no alternative but to commence an action for injunctive relief which will include costs for attorney's fees.

Yours very truly,

INTERNATIONAL DAIRY QUEEN, INC.

/s/ Herman E. Nelson

Vice President-Law

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PAUL M. FENNESSY AND AUDREY E. GUTHRIE, ETC.,

Plaintiffs,

Index No. 83CV1720
(Judge Munson)

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Defendants.

AFFIDAVIT

(Enclosure "O")

STATE OF TEXAS)
: ss.:
COUNTY OF HARRIS)

Joseph G. O'Leary and Phylis O' Leary, his wife, first having been duly sworn, depose and say:

1. We are husband and wife and owned and operated a Dairy Queen store as franchisees in Cortland New York, from July of 1971 until terminated by Dairy Queen in November of 1977. We currently reside in the State of Texas at 2004 San Sebastion Court, 6115, Houston, TX 77058

3. We have been asked to read the affidavit of one Gwendolyn Putman of the Canton, New York Dairy Queen store describing a certain telephone survey she conducted, in 28 numbered paragraphs, in the fall of 1983 and the winter of 1983-84, and been asked to comment thereon.

4. We can jointly state that we were ignorant of the activities of Dairy Queen and its suppliers described in that affidavit, including being ignorant that Dairy Queen had arranged with its suppliers not to sell to us Dairy Queen franchisees directly, and ignorant of the described billing arrangements whereby Dairy Queen requires suppliers to sell to it, on paper, then re-sells to authorized warehouses, apparently taking profits secretly on such sales. We were ignorant of these facts even on the date we settled our case and up to the date we read the Putman affidavit. For purposes of this affidavit we assume the truth of the

facts set forth in the Putman affidavit.

/s/_____
Phylis O'Leary

/s/_____
Joseph G. O'Leary

Subscribed and Sworn To

Before Me This day of February, 1984

/s/_____

NOTARY PUBLIC

DAIRY QUEEN

System Bulletin No. 004-N-1

TO: All"Dairy Queen"Stores

FROM: Larry Wille, Director of Research & Development

DATE: January 5, 1983

SUBJECT: System Approved Products

THIS SYSTEM BULLETIN CANCELS AND SUPERSEDES SYSTEM BULLETIN NO. 004-M-1.

Following is the updated list of approved products for use in the "Dairy Queen" soft serve store. We hope that this updated list will provide you with a choice of product of proven and consistent quality.

It is our intention to continue to circulate to the system lists of additoinal products which are approved from time to time.

It is our concern that you use in your operation the approved products as authorized by contract for your type of store

in order that our system be more consistent to consumers of "Dairy Queen" products. However, you may purchase the approved products from any source you desire. (Emphasis added.)

It is anticipated that there will be questions from time to time regarding additional approved products. Questions and requests in this regard should be directed to:

Larry Wille
Director of Research and Development
International Dairy Queen, Inc.
P.O. Box 35286
Minneapolis Minnesota 55435

LW/mss

DAIRY QUEEN

System Bulletin Number 004-A

TO: The System

FROM: Gordon Huber

DATE: March 26, 1971

SUBJECT: DAIRY QUEEN System Approved Products

THIS SYSTEM BULLETIN CANCELS AND SUPERSEDES SYSTEM BULLETIN NUMBER 004.

We are presently in the process of preparing a list of all approved products for use in the DAIRY QUEEN system. We expect to complete this compilation within the next sixty days. we hope that the complete list will provide you with a choice of products of proven and consistent quality. It is our intention to circulate to the system portions of the approved porduct list as they are completed. The first installment of the list of approved products is attached hereto. You will note that it is categorized by the type of franchise agreement under which the product

is authorized to be sold by item, size, pack, label and manufacturer or source.

It is our concern that you use in your operations the approved products as authorized, by contract, for your type of store in order that our "System" be more consistent to the consumers of DAIRY QUEEN. <u>However, you may purchase the approved products, of the manufacturer specified herein, from any source that you so desire</u>. (Emphasis added.) We recommend, of course, that it is in the best interest of the system members, wherever economically feasible, to purchase from an authorized warehouse which undertakes the burden of supplying a wide range of products at consistently fair margins.

It is anticipated that, until the complete listing of approved products is completed , there will be questions as to whether a particular product currently being used is contemplated for the approved list. Questons in this regard should be directed

to Gordon Huber, Vice President of Marketing, International Dairy Queen, Inc., P.O. Box 35286, Minneapolis, Minnesota 55435.

GFH/vab /s/ GH

Attachment

DAIRY QUEEN

System Bulletin No.004-G-1

TO: All"Dairy Queen"Stores

FROM: Ray Klempp

DATE: January 20, 1976

SUBJECT: SYSTEM APPROVED PRODUCTS

THIS SYSTEM BULLETIN CANCELS AND SUPER SEDES #004,3004-A,#004-B, #004-C-1, #004-D-1, #004-E-1 and #004-F-1.

Following is the updated list of approved products for use in the "DairyQueen" soft serve store. We hope that his expanded and updated list will provide you with a choce of product of proven and consistent quality. It is our intention to continue to circulate to the system lists of additonal products which are approved from time to time.

It is our concern that you use, in your operation, the approved products as authorized by contract for your type of store in order that our "system" be more consistent to consumers of "Dairy Queen" . However, you

may purchase the approved products from any source you desire. (Emphasis added.)

It is anticipated that there will be questions, from time to time, regarding additionally approved products. Questions and requests in this regard should be directed to:

Director of Research and Development
International Dairy Queen, Inc.
P.O. Box 35286
Minneapolis, MN 55435

International Dairy Queen, Inc.

P.O. Box 35286

Minneapolis, MN 55435

Gentlemen:

Re: Distributorship

In order to improve the distribution of, and billing and remittance for, our products which may from time to time be approved by you for use by Dairy Queen retail outlets, we are hereby requesting that International Dairy Queen, Inc., accept appointment as a distributor of our products to warehouses serving Dairy Queen retail outlets.

The specific products which shall be covered by this distributorship, their specifications, and price, as well as the payment terms and authorizations, if any, to use various of your trade names and marks in respect to such productsk, shall be the matter of separate and specific agreements between us and International Dairy Queen, Inc.

The proposed distributorship,if accepted by you, shall continue in accordance with the

terms of this letter until either we, or International Dairy Queen, Inc., give the other 120days written notice of termination. In the event of termination, we shall continue to honor our committment to provide specific products pursuant to the terms of this agreement, as supplemented by specific agreements relating to such products, for 120 days or for such different period as specified in said supplemental agreements.

It is contemplated that International Dairy Queen, Inc., will authorize certain customers to submit directly to us, on behalf and for the account of International Dairy Queen, Inc., purchase orders in a form specified by International Dairy Queen , Inc., for product subject to this distributorship agreement. You shall notify us in writing, from time to time, of the names of the warehouse customers so authorized. International Dairy Queen, Inc. shall be

responsible for payment in accordance with the terms of this agreement as supplemented by specific agreement for products shipped to such approved warehouses pursuant to such purchase orders.

We shall in our billings to you adequately identify and categorize purchases shipped directly to specified warehouses pursuant to such purchase orders. On a monthly basis we will furnish you reports relative to shipments and backorders by product and location and such other data as you may from time to time specify.

If the foregoing is acceptable to International Dairy Queen, In., please idicate your acceptance in the space provided below on the attached copy of this letter and return to us. Thank you for your consideration of this proposal.

Very truly yours,

ICELAND PRODUCTS, INC

By /s/ illegible

International Dairy Queen, Inc.
hereby accepts this distributorship
on the terms and conditons set forth
in the above letter this 29th
day of March, 1977.

INTERNATIONAL DAIRY QUEEN, INC.

By /s/ Edward P. G (Illegible)

Its Vice Pres.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Margaret R. Powers as Executrix
of the Estate of Donald M. Powers,
Deceased,

No. 78 CV 406

Plaintiff,

-against-

International Dairy Queen, Inc.;
American Dairy Queen Corporation and
Dairy Queen Financial, Inc.,

Defendants.

DEFENDANTS' JOINT ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

TO: Plaintiff above named and her attorney, Thomas A. King,304 Larned Building, 114 So. Warren Street, Syracuse, New York 13202:

Defendants International Dairy Queen, Inc. and Marican Dairy Queen Corporation hereby submit their Joint Answewrs to Plaintiffs' First Set of Interrogatories pursuant to the

the applicable Rules of Civil Procedure.

* * * *

(Introductory material omitted.)

INTERROGATORY 1. Identify the answering official or officials, indicating corporate title, stating how long he has been with you and how long he has held such title.

RESPONSE. Gordon F. Huber. Mr. Huber is presently the Executive Vice President. He has been with the Dairy Queen operation since 1962. He has held the title of Executive Vice President since 1972.

* * * *

(Omissions)

INTERROGATORY NO. 3. State whether any policy directives, resolutions, manuals, standard operating procedure guidelines or the like exists or existed at any time during the period in suit relative to your dealing with approved suppliers in the

in the Dairy Queen system or relative to your methods of quality control over such suppliers and identify any such documents.

RESPONSE. With the exception of meat and mix, there are no approved suppliers. Rather, Dairy Queen approves products, which stores may obtain from any available source. As to meat and mix, Dairy Queen approves a number of manufacturers. Stores are free to purchase products manufactured by authcrized mix or meat suppliers from either the manufacturer or from a distributor in instances where there is such a distributor.

* * * *

(Balance of Answers omitted.)

Dated: Feb. 14th, 1979.

/s/_____
Gordon F. Huber

Subscribed and Sworn to before me this 14th day of February, 1979

/s/_____
Herman E. Nelson, Notary Public